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APPENDIX.

2 UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

In the Matter of
Universal-Rundle Corporation,
a corporation. } Docket No. 8070

COMPLAINT.

The Federal Trade Commission, having reason to believe the respondent named in the caption hereof, and more particularly designated and described hereinafter, has violated and is now violating the provisions of Section 2(a) of the Clayton Act, as amended (U. S. C., Title 15, Section 13), hereby issues its complaint, stating its charges with respect thereto as follows:

Paragraph One: Respondent Universal-Rundle Corporation, sometimes referred to as respondent U-R, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located in the City of New Castle, Pennsylvania.

Paragraph Two: Since about 1949, respondent U-R has been and is now engaged in the production, sale and distribution of plumbing fixtures and equipment, including vitreous-enameled cast iron and china fixtures.

It operates plants and warehouses in Milwaukee, Wisconsin; Camden, New Jersey; Redlands, California; and Hondo, Texas, in addition to New Castle, Pennsylvania. It also maintains warehouses in Boston, Chicago, Minneapolis and Los Angeles. Said respondent maintains sales offices

in 24 States of the United States and in the Dominion of Canada.

3 Respondent's total net sales for all products for the fiscal year ending January 31, 1957, amounted to approximately $24,000,000.

Paragraph Three: Respondent U-R, in the course and conduct of its said business, has been and is now, engaged in commerce, as "commerce" is defined in the Clayton Act, in that it has sold and distributed its products throughout the United States to purchasers thereof in states other than the state of origin of shipment and either directly or indirectly has caused such products, when sold, to be shipped and transported from the state of origin to purchasers located in other states. There is now and has been a constant course and flow of trade and commerce in such products between said respondent in the state of origin and purchasers located in other states.

Paragraph Four: In the course and conduct of its said business in commerce, respondent U-R has sold, and now sells, its products to purchasers thereof, some of whom have been and are in competition with each other and with customers of competitors of respondent, in the purchase, resale and distribution of such products.

Paragraph Five: Respondent U-R, either directly or indirectly, has been for more than three years last past, and is now, discriminating in price between different purchasers of its products by selling such products to some purchasers at substantially higher prices than the prices at which respondent sells such products of like grade and quality to other purchasers, some of whom are engaged in competition with the less favored purchasers in the resale of such products.

For example, respondent U-R has sold its products to some favored customers at prices less than the prices

charged to unfavored competing customers in amounts ranging percentage-wise from 2% to 20% or more.

As a further example, said respondent has sold its products to Sears, Roebuck and Co. at prices less than those charged to other competing customers, such preferential prices ranging from 5% to 45% less than the prices charged to others who compete with Sears in the resale of such products.

Paragraph Six: The effect of the said discriminations in price may be substantially to lessen competition or tend to create a monopoly in the respective lines of com-
4 merce in which respondent and the purchasers receiving the preferential prices are engaged, or to prevent, injure or destroy competition between and among the purchasers of such products from respondent.

Paragraph Seven: The discriminations in price, as hereinbefore alleged, are in violation of the provisions of Section 2(a) of the Clayton Act, as amended.

Wherefore, The Premises Considered, the Federal Trade Commission, on this 4th day of August A.D., 1960, issues its complaint against said respondent.

27 BEFORE FEDERAL TRADE COMMISSION.

• • (Caption—8070) • •

BILL OF PARTICULARS.

Pursuant to an order of Hearing Examiner Buttle on January 24, 1961, counsel supporting the complaint hereby files a Bill of Particulars responding to the provisions of the aforesaid order as follows:

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REPRESENTATIVE PRODUCT TYPES AND PRICES, TRADING AREAS AND DATES FOR SALES TO SEARS AND TO THE TRADE.

Product	Product Nos. Sears	Product Nos. Trade	Prices Sears Low	Prices Sears High	Prices Trade Low	Prices Trade High	Trading Area	Date
(1) 4½' recess tub—C. I. white	11020	21000	$44.75	$46.75	$49.81	$52.57	Cleveland	1957
(2) 4½' recess tub—C. I. white	11020	21000	44.75	46.75	55.20	55.34	Detroit	1957
(3) 4½' recess tub—C. I. white	11020	21000	44.75	46.75	49.81	52.57	Rochester, N. Y.	1957
(4) 4½' recess tub—C. I. white	11020	21000	46.00	46.75	55.34	55.34	Louisville	1957
(5) 4½' recess tub—color	11022-9	21002-9	53.00	53.75	69.18	69.18	Detroit	1957
(6) 4½' recess tub—color	11022-9	21002-9	51.75	53.75	62.26	65.72	Rochester, N. Y.	1957
(7) 4½' recess tub—C. I. color	11022-9	21002-9	53.00	53.75	69.18	69.18	Louisville	1957
(8) 4½' recess tub—C. I. white	11030	21010	44.75	46.75	49.81	55.34	Cleveland	1957
(9) 4½' recess tub—C. I. white	11030	21010	44.75	46.75	55.20	55.20	Detroit	1957
(10) 4½' recess tub—C. I. white	11030	21010	44.75	46.75	52.57	52.57	Rochester, N. Y.	1957
(11) 4½' recess tub—C. I. white	11030	21010	46.00	46.75	55.34	55.34	Louisville	1957

29

(12) 4½' recess tub—C. I. color	11032-9	21012-9	51.75	53.75	52.57	69.18	Cleveland	1957
(13) 4½' recess tub—C. I. color	11032-9	21012-9	53.00	53.75	63.99	69.18	Detroit	1957
(14) 5' corner tub—C. I. white	11220	21200	53.75	55.75	58.97	62.24	Cleveland	1957

Product	Product Nos. Sears	Product Nos. Trade	Prices Sears Low	Prices Sears High	Prices Trade Low	Prices Trade High	Trading Area	Date
(15) 5′ corner tub—C. I. white	11220	21200	53.75	55.75	60.61	65.52	Detroit	1957
(16) 5′ corner tub—C. I. white	11220	21200	53.75	55.75	62.24	62.24	Rochester, N. Y.	1957
(17) 5′ corner tub—C. I. white	11220	21200	53.75	55.75	49.14	65.52	Buffalo	1957
(18) 5′ corner tub—C. I. color	11222–9	21202–9	63.00	63.75	62.24	77.81	Cleveland	1957
(19) 21″ x 20″ sink—C. I. white	13001	23001	9.50	9.50	14.26	14.26	Cleveland	1957
(20) 32″ x 20″ sink—C. I. white	13541	23501	16.50	17.50	20.16	22.40	Cleveland	1957
(21) 42″ x 20″ sink—C. I. white	14001	24001	21.00	23.00	25.56	26.53	Cleveland	1957
(22) 1 pc. Como toilet V. C. white	30100	40100	46.00	48.10	68.75	68.75	Cleveland	1957
(23) 1 pc. Como toilet V. C. white	30100	40100	46.00	48.10	68.75	69.61	Detroit	1957
(24) 1 pc. Como toilet V. C. color	30102–9	40102–9	56.00	57.10	90.35	90.35	Cleveland	1957
(25) Reverse trap unit bowl—V. C. white	32220	42220	9.25	9.75	10.25	12.32	Cleveland	1957
(26) Reverse trap unit bowl—V. C. color	32222–9	42222–9	11.00	11.50	14.06	15.93	Cleveland	1957
(27) Unit tank V. C. white	34430	44450	9.35	9.85	11.63	12.93	Cleveland	1957
(28) 19″ x 15″ low back lavatory V. C. white	35820	45820	7.90	7.90	9.48	10.53	Cleveland	1957
(29) Pedestal-color	39002–9	49082–9	6.25	6.55	8.10	8.10	Louisville	1957

31 In addition to the foregoing, the other trading areas relied upon or contemplated by the complaint are the Philadelphia-Camden area, the Pittsburgh area, the Boston and Chicago areas also.

The period of time for the specific instances or transactions hereinbefore set forth was the year 1957, but it is not intended to confine the evidence to that year only but it is our intention to show similar discriminations subsequent to the year 1957.

It is believed that the foregoing is responsive to the hearing examiner's order requiring the submission of a Bill of Particulars to counsel for the respondent.

Respectfully submitted,

Lewis F. Depro,
Counsel Supporting Complaint.

February 3, 1961.

32 BEFORE FEDERAL TRADE COMMISSION.

* * (Caption—8070) * *

ANSWER.

Respondent, Universal-Rundle Corporation, for its Answer to the Complaint herein, states:

Paragraph One: Respondent admits the allegations of Paragraph One.

Paragraph Two: Respondent admits the allegations of the first and third paragraphs of Paragraph Two but denies the allegations of the second paragraph of Paragraph Two except that it admits it maintains warehouses in Boston, Minneapolis and Los Angeles and it operates plants, with warehouses adjacent or appurtenant thereto, in Camden, New Jersey, Redlands, California, Hondo, Texas and New Castle, Pennsylvania.

Paragraph Three: Respondent admits the allegations of Paragraph Three.

33 Paragraph Four: Respondent denies the allegations of Paragraph Four except it admits that in the course and conduct of its business in commerce it has sold and sells its products to purchasers, some of whom have been and are in competition with customers of competitors of Respondent.

Paragraph Five: Respondent denies the allegations of Paragraph Five.

Paragraph Six: Respondent denies the allegations of Paragraph Six.

Paragraph Seven: Respondent denies the allegations of Paragraph Seven.

Affirmative Defenses.

1. In each instance wherein Respondent charged two or more customers different prices for goods of like grade and quality, such price differentials as may have existed made only due allowanee for differences in the cost of manufacture, sale and delivery resulting from differing methods or quantities in which such products were sold or delivered to such customers.

34 2. In each instance wherein Respondent charged two or more customers different prices for goods of like grade and quality, the lower prices were given in good faith to meet competition.

Wherefore, Respondent prays that the Complaint herein be dismissed.

Kahn, Adsit & Arnstein,
By Samuel Weisbard,
Attorneys for Respondent.

Dated: March 13, 1961.

41 BEFORE FEDERAL TRADE COMMISSION.

• • (Caption—8070) • •

AMENDMENT TO BILL OF PARTICULARS.

Pursuant to an Order of Hearing Examiner Buttle on October 4, 1961, counsel supporting the complaint hereby files the following Amendment to the Bill of Particulars as follows:

I.

The Tables contained hereinafter illustrate representative instances of price discrimination by respondent on the Homart line in favor of Sears Roebuck and against trade purchasers of its own brand-name line in the Philadelphia-Camden area for the period February 1, 1957 through December 31, 1957. The specific instances contained in the following Tables are considered representative by counsel supporting the complaint.

U-R Product	Purchaser	Date	Price	Homart Product	Date	Price	Differential	%
2100, 2101 (White)	Camden	2/ 8	1 @ 55.34	1102, 1103 (White)	2/ 6	7 @ 46.00	9.34	16.87%
				1102, 1103 (White)	2/ 7	8 @ 46.00	9.34	16.87%
2100, 2101 (White)	Central	4/23	1 @ 58.11	1102, 1103 (White)	4/26	20 @ 46.75	11.36	19.54%
2100, 2101 (White)	Central	6/25	4 @ 55.20	1102, 1103 (White)	6/27	20 @ 44.75	10.45	20.74%
2100, 2101 (White)	Henry	8/16	1 @ 55.34	1102, 1103 (White)	8/19	5 @ 46.75	8.59	15.52%
2100, 2101 (White)	H. Arensberg	10/11	1 @ 55.34	1102, 1103 (White)	10/14	10 @ 46.00	9.34	16.87%
2100, 2101 (Color)	Mars	3/27	1 @ 72.64	1102, 1103 (Color)	3/27	10 @ 53.00	19.64	27.03%
2100, 2101 (Color)	Henry	6/13	1 @ 72.64	1102, 1103 (Color)	6/14	2 @ 53.75	18.89	26.00%
2100, 2101 (Color)	Mars	8/24	2 @ 69.18	1102, 1103 (Color)	8/21	1 @ 53.75	15.43	22.30%
2100, 2101 (Color)	Broudy	9/17	1 @ 69.18	1102, 1103 (Color)	9/18	5 @ 53.00	16.18	23.38%
2120, 2121 (White)	H. Arensberg	3/5	1 @ 65.52	1122, 1123 (White)	3/ 5	10 @ 55.00	10.52	16.05%
2120, 2121 (White)	Hajoca	4/29	1 @ 68.80	1122, 1123 (White)	5/ 1	10 @ 55.75	13.05	18.96%
2120, 2121 (White)	Central	6/19	1 @ 68.80	1122, 1123 (White)	6/19	1 @ 53.75	15.05	21.87%
2120, 2121 (White)	Friedman	8/29	1 @ 65.52	1122, 1123 (White)	8/21	20 @ 55.75	9.77	14.91%
2120, 2121 (White)	Central	11/15	1 @ 65.52	1122, 1123 (White)	11/11	10 @ 55.00	10.52	16.05%
43								
2120, 2121 (Color)	Henry	2/12	1 @ 81.90	1122, 1123 (Color)	2/11	35 @ 63.00	18.90	23.07%
				1122, 1123 (Color)	2/13	15 @ 63.00	18.90	23.07%
2120, 2121 (Color)	H. Arensberg	4/ 2	2 @ 86.00	1122, 1123 (Color)	4/ 2	2 @ 63.75	22.25	25.87%
2120, 2121 (Color)	Henry	7/30	1 @ 81.90	1122, 1123 (Color)	7/31	5 @ 63.75	18.15	22.16%
2120, 2121 (Color)	Girard	9/30	1 @ 81.90	1122, 1123 (Color)	9/30	5 @ 63.00	18.90	23.07%
23001	Weinstein	5/ 9	1 @ 15.01	13001	5/ 8	29 @ 9.50	5.51	36.70%
23001	Henry	10/25	2 @ 15.01	13001	10/25	25 @ 9.50	5.51	36.70%
23501	H. Arensberg	2/ 7	2 @ 22.40	13541	2/ 7	25 @ 17.50	4.90	21.87%
23501	Mars	6/ 6	3 @ 21.28	13541	6/ 5	40 @ 16.50	4.78	22.46%
				13541	6/ 7	20 @ 16.50	4.78	22.46%
4010 (White)	Fisher	2/27	1 @ 68.75	3010 (White)	3/ 1	10 @ 46.00	22.75	33.09%
4010 (White)	Henry	7/11	1 @ 68.75	3010 (White)	7/12	5 @ 48.10	20.65	30.03%
4010 (Color)	Bellmawr	3/22	1 @ 90.35	3010 (Color)	3/22	32 @ 56.00	25.16	31.00%
			— 9.19	(seat)				
			81.16					
4010 (Color)	Pesco	8/14	1 @ 90.35	3010 (Color)	8/19	5 @ 57.10	24.06	29.64%
			— 9.19	(seat)				
			81.16					
44								
4222 (Color)	Girard	3/22	1 @ 14.06	3222 (Color)	3/22	120 @ 11.10	2.96	21.05%
4222 (Color)	H. Arensberg	10/ 3	1 @ 15.12	3222 (Color)	10/ 3	150 @ 11.25	3.87	25.59%
4445 (White)	Mars	2/25	3 @ 12.93	3443 (White)	2/26	100 @ 9.40	3.53	27.30%
4445 (White)	Kaighn Ave.	7/ 3	1 @ 12.93	3443 (White)	7/ 2	100 @ 9.35	3.58	27.68%
4445 (White)	Hajoca	8/14	2 @ 12.93	3443 (White)	8/19	100 @ 9.85	3.08	23.82%

45 II.

The following Tables are illustrative of pricing situations wherein respondent discriminated in price between competing purchasers of its own brand-name line of fixtures. The specific instances contained in the Tables are considered by counsel supporting the complaint to be representative, and cover the period February 1, 1957 through December 31, 1957, in the Philadelphia-Camden area.

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Product	Unfavored purchaser	Date	Price	Favored purchaser	Date	Price	Differential	%
2110, 2111(W)	Hajoca	5/15	$60.91	Mars	5/15	$51.12	9.79	16.07
2111(W)	H. Arensberg	9/ 5	59.14	Mars	9/ 4	51.12	8.02	13.56
2110, 2111(C)	Henry	2/28	73.93	Mars	2/28	70.23	3.70	5.00
2111(C)	Central	5/17	76.15	Mars	5/15	65.75	10.40	13.65
2114, 2115(W)	H. Arensberg	6/21	46.19	Central	6/25	43.85	2.34	5.06
2114, 2115(C)	Black & Brown	5/13	55.48	Mars	5/15	49.10	6.38	11.49
2204(W)	Henry	6/13	23.80	Central	6/25	21.28	2.52	10.58
2204(C)	Hajoca	3/ 1	27.10	Mars	2/28	25.74	1.36	5.01
2270(W)	Henry	7/10	10.57	Central	6/25	10.04	.53	5.01
23101	Henry	6/ 6	17.25	Central	6/25	16.39	.86	4.98
24511	Henry	2/28	44.46	Mars	2/28	42.24	2.22	4.99
4035(W)	Henry	5/ 8	25.25	Central	5/ 7	21.00	4.25	16.83
4035(C)	Mars	2/ 7	31.55	Shuster	2/ 7	28.39	3.16	10.01
4070(W)	Henry	5/ 8	22.35	Central	5/ 7	20.47	2.28	10.02

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4556(W)	H. Arensberg	5/10	9.18	Girard	5/13	8.72	.46	5.01
4556(C)	Black & Brown	2/28	11.49	Mars	2/28	10.92	.57	4.96
4564(C)	H. Arensberg	8/19	20.32	Shuster	8/15	19.25	1.07	2.56
4912(W)	Black & Brown	2/18	4.31	Shuster	2/27	3.08	1.23	28.53
2203(W)	Henry	6/ 6	27.15	Camden	6/25	25.80	1.35	4.97
2203(C)	Broudy	9/17	31.30	Mars	9/ 4	26.84	4.46	14.24
2271(W)	Henry	5/14	10.57	Shuster	5/ 3	10.04	.53	5.01
2271(C)	Central	6/27	13.21	Shuster	6/28	12.55	.66	4.99
2278(C)	Henry	2/21	40.00	Fisher	2/19	30.00	10.00	25.00
23521	Henry	6/25	22.40	Central	6/25	20.18	2.22	9.91
24121, 24131	Levin	9/16	32.00	Mars	9/ 4	30.40	1.60	5.00
4025(C)	Pesco	5/29	41.95	Fisher	5/24	37.75	4.20	10.01
4089(W)	Camden	5/ 9	26.25	Central	5/ 7	23.62	2.63	10.01
4070(C)	Hajoca	9/20	28.30	Broudy	9/18	25.47	2.83	10.00
4075(W)	Henry	6/14	27.84	Central	6/25	25.06	2.78	9.98

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Product	Unfavored purchaser	Date	Price	Favored purchaser	Date	Price	Differential	%
4123 (C)	Black & Brown	7/25	12.37	Fisher	7/31	11.14	1.23	9.94
4443 (C)	Black & Brown	5/29	15.93	Pesco	5/16	14.33	1.60	10.04
6050, 6051 (C)	Central	3/ 7	51.19	Fisher	3/ 7	46.31	4.88	9.53
80114	N. Friedman	3/ 5	14.70	Central	3/21	13.23	1.47	10.00
80445	N. Friedman	2/15	4.45	Central	2/ 6	3.50	.95	21.34

49 At the date of this writing, counsel supporting the complaint are not yet in receipt of copies of invoices which it was agreed would be furnished by counsel for respondent. Accordingly, it was impossible to include in the Tables above pricing situations involving American Plumbing and Heating Supply and Richmond Plumbing Supply. It should also be noted that the specific instances contained in the Tables are representative only, and should not be construed as a listing of the entire proof intended to be adduced.

Respectfully submitted,
Lewis F. Depro,
Stanley M. Lipnick,
Counsel Supporting the Complaint.

270 BEFORE FEDERAL TRADE COMMISSION.

* * (Caption—8070) * *

INITIAL DECISION.

Edgar A. Buttle, Hearing Examiner.

Lewis F. Depro and Stanley M. Lipnick, for the Commission.

Kahn, Adsit & Arnstein, Chicago, Illinois, for the respondent.

This complaint, issued on August 4, 1960, alleges in part that respondent Universal-Rundle Corporation, a manufacturer of plumbing fixtures, violated section 2 (a) of the amended Clayton Act, by selling plumbing fixtures to Sears, Roebuck and Co. under the Sears' brand name Homart, at lower prices than plumbing fixtures of like grade and quality were sold by respondent under the Universal-Rundle brand name.

In answering this part of the complaint, respondent denied that plumbing fixtures sold under the two brands were of like grade and quality.[1]

Trial of this proceeding commenced on October 15, 1962, following the Commission's rejection of an initial de-
271 cision reached by consent in which the allegations of the complaint pertaining to prices charged Sears, Roebuck and Co. for plumbing fixtures purchased under the Homart brand name were dismissed.[2]

At the completion of the Commission's prima facie case, respondent orally made a motion to dismiss this charge of illegal price discrimination with respect to the sale of

1. Paragraph Five of respondent's answer.

2. *Sears, Roebuck & Co.* v. *FTC, et al.*, 210 F. Supp. 67 (1962).

plumbing fixtures sold to Sears, Roebuck and Co., relying primarily on the failure of Commission's counsel to prove by substantial evidence that such fixtures are of like grade and quality as the plumbing fixtures sold under the Universal-Rundle brand. The hearing examiner reserved decision on respondent's motion pending completion of respondent's defense evidence on this issue. (Tr. 2094.)

By order dated April 17, 1963, the hearing examiner severed the foregoing issue of like grade and quality from all other issues in this proceeding[3] since it then appeared that a resolving of this issue might eliminate the need for the presentment of extensive proof and a lengthy check of the basic cost data by Commission's attorneys and accountants incident to respondent's cost justification defense which was not completed. In view of the severance and since respondent's cost evidence was not completed by reason of the hearing examiner's severance order and completion of cross-examination and a check of the cost data was thereby precluded, all of the evidence relating to respondent's cost justification defense (i.e., cost by computations and allocations accompanied by expert accounting testimony) is stricken as irrelevant to the issue of "like grade and quality" without prejudice to its reinstatement as a part of the record on respondent's motion in the event the hearing examiner's decision on the severed issue of like grade and quality is not affirmed.

Prior to trial, an amended bill of particulars was filed by counsel in support of the complaint.[4] At trial, counsel supporting the complaint stated that the Commission's proof of violation of section 2 (a) by respondent in selling

3. This issue severed pursuant to respondent's motion of April 10, 1963, was unopposed by counsel in support of the complaint.

4. Amendment to Bill of Particulars filed October 21, 1961.

plumbing fixtures to Sears, Roebuck and Co. would be
272 limited to sales of the specific plumbing fixtures set forth in the amended bill of particulars (Tr. 157-160) made in the year 1957 in the Philadelphia-Camden area (Tr. 3) and there was no intention "to introduce proof or to contend in this case that the sales of products other than the products listed in the (amended) bill of particulars were made at unlawful low prices." (Tr. 160.)

The only plumbing fixtures at issue under the severance order are vitreous chine and enameled cast-iron bathroom fixtures and cast-iron kitchen sinks. Each Homart plumbing fixture listed in the amended bill of particulars is directly compared by the Commission to a specific trade fixture sold under the U-R brand. In all, seven different product comparisons are set forth, although since white and color plumbing fixtures are separately compared as to three of these products a total of ten comparisons are made. Aside from the color question, the only plumbing fixtures contended to be of like grade and quality are one recess enameled cast-iron bathtub, one enameled cast-iron corner bathtub, one one-piece vitreous water closet, two cast-iron kitchen sinks and one vitreous china water closet tank plus a vitreous water closet bowl from each respective brand.

The hearing examiner, after severing the issue of "like grade and quality" of the fixtures sold to Sears under the Homart brand name from all other issues in this proceeding, granted respondent's motion to dismiss the charges pertaining to the sale of fixtures to Sears, Roebuck and Co. upon a finding that such fixtures were not of like grade and quality as the fixtures sold under the U-R brand name. (Tr. 2628, 2629.) Findings and conclusions with respect to this issue are made a part of this initial decision, in Part I hereof.

Pursuant to stipulation of counsel (Tr. 2629, 2630) at a hearing held on July 29, 1963, the remaining issue in this

proceeding is whether sales by respondent of plumbing fixtures under the U-R brand to customers in Philadelphia, Pennsylvania, and Camden, New Jersey, violated section 2(a) of the act at the buyer level of competition. In this connection respondent is charged with selling identical plumbing fixtures under the respondent's U-R brand at different prices to competing purchasers. Counsel in support of the complaint has conceded that no injury to competition on the primary line or seller level of competition has been established in connection with the sale of respondent's U-R branded fixtures. (Tr. 2628, 2632.) The two issues aforesaid are discussed separately in Parts I and II hereof, respectively.

273 The hearing examiner has carefully considered the proposed findings of fact and conclusions submitted by counsel in support of the complaint and counsel for the respondent, supplemented by extensive oral argument thereon, and such proposed findings and conclusions if not herein adopted, either in the form proposed or in substance, are rejected as not supported by the record or as involving immaterial matters.

Upon the entire record in the case the hearing examiner makes the following findings of fact and conclusions:

Part I.

Alleged Discriminatory Prices to Sears, Roebuck—Homart Line.

Nature of Respondent's Business and Products.

1. Respondent Universal-Rundle Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located in the city of New Castle, Pennsylvania.[5]

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5 Answer.

2. Since about 1949, respondent Universal-Rundle Corporation, sometimes referred to as "Rundle", has been and is now engaged in the production, sale and distribution of plumbing fixtures and equipment, including enameled cast-iron and vitreous china fixtures.[6]

3. Respondent operates plants, warehouses, and sales offices in various cities throughout the United States, including New Castle, Pennsylvania, and Camden, New Jersey.[7]

4. Respondent Rundle, in the course and conduct of its said business, has been and is now engaged in commerce, as "commerce" is defined in the Clayton Act, in that it has sold and distributed its products throughout the
274 United States to purchasers thereof located in states other than the state of origin of shipment, and either directly or indirectly has caused such products, when sold, to be shipped and transported from the state of origin to purchasers located in other states, and there is now and has been a constant course and flow of trade and commerce in such products between said respondent in the state of origin and purchasers located in other states.[8]

5. In the course and conduct of its said business in commerce, respondent Rundle has sold, and now sells, its products to purchasers thereof, some of whom have been and are in competition with each other and with customers of competitors of respondent, in the purchase, resale and distribution of such products.

Rundle's principal competitors have been American Radiator & Standard Sanitary Corp., The Kohler Company, Crane & Co., Elger Division of Murray Corp., and Rheem-Richmond. All of these companies were in competition with Rundle in 1957 in the Philadelphia-Camden area.

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6. Id.
7. Answer and Tr. 6.
8. Answer.

The plumbing fixtures of the above-named companies, together with Rundle's own branded products, are substantially similar in grade and quality and are comparable in marketability and in prices.[9]

6. Respondent Rundle sells its plumbing fixtures under its own name and brand of "Universal-Rundle", hereinafter referred to as "U-R", and sells and distributes such products on a nation-wide basis, generally to wholesalers of plumbing and heating supplies. Such wholesalers also sell to some extent at retail. In 1957, Rundle also sold its products to a class of customers known as "DTU's," i.e., direct-to-you, which class also did some wholesale business.

The products made by Rundle and sold under its own brand name to its various customers, numbering approximately 8,000 in 1957, are of like grade and quality, there being no difference in those products sold by Rundle to its various customers, some of whom compete with each other in the resale of such products.[10]

294 Part II.

Discriminatory Prices to Certain U-R Line Customers.

10. In 1957, Rundle has sold its plumbing fixtures under its own brand name of "Universal-Rundle", sometimes referred to as "U-R", to certain customers in the Philadelphia-Camden market area at prices substantially higher than it has sold the same identical products to other customers who have been and are in competition with the unfavored customers in the resale of such products in said area. [That Rundle's trade products are of like grade and quality has been conceded by counsel for respondent. (Tr. 2629.)]

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9. Answer to complaint; Tr. 23, 24, 44, 362, 363, 525, 526, 1465, 1466.

10. Tr. 5, 7, 9, 13, 16, 1465, 1466.

For example, in the Philadelphia-Camden area in 1957, respondent sold a particular type of lavatory, 22040, to Henry Supply Company of Camden, New Jersey, at a unit price of $23.80, and also at about the same time sold an identical product to Central Supply of Camden at $21.28, a price differential of about $2.50 each, or approximately a 10% discount to Central. Both Central and Henry are in competition with each other in the resale of such products. (CX's 83Z-42, 84Z-57.)

Also, in 1957, Black & Brown, Incorporated, purchased from respondent a 5-foot, 14-inch recessed tub, 21152, at $55.48. At the same time, respondent sold to Mars Supply Company, competing with Black & Brown, the identical product at $49.10, or a percentage differential in favor of Mars of approximately 11%. (CX's 82Q, 85Z-52.)

Respondent sold a 19 x 17 inch lavatory, 22040, to Black & Brown at $23.80, and at about the same time it sold the identical product of identical grade and quality to Mars Supply Company at $21.28, amounting to approximately a 10% advantage over Mars. (CX's 82R, 85Z-51.)

Another illustration is shown by a Rundle sale to Hajoca in Camden, New Jersey, of a 5-foot recessed tub, 21110, at a net wholesale price of $60.91, although at the same time respondent also sold an identical tub to Mars Supply in Philadelphia for $51.12, or a differential of 16% in favor of Mars. (CX's 86N, 85Z-52.)

295 In May 1957, Rundle sold a "Castle" water-closet combination, 40350, to Henry Supply at $25.25, and also in May 1957, respondent sold an identical product to Central Supply at $21.45, or a price differential in Central's favor of approximately 17%. (CX's 83Z-26, 84Z-34.)

The following sales are also illustrative of discriminatory prices granted by respondent in the Philadelphia-Camden market area:[56]

(1) On February 28, 1957, tub 21106 to Mars at $70.23. (CX 85Z-6.)

On February 21, 1957, tub 21106 to Henry Supply at $73.93. (CX 83-R)—approximately 5% advantage to Mars.

(2) On February 28, 1957, "Castle" comb. 40356 to Mars at $28.39 (CX 85Z-9) and to Henry at $31.55. (CX 83V)—approximately 10% advantage to Mars.

(3) On May 15, 1957, 19 x 17" lavatory 22040 to Mars at $21.28 (CX 85Z-51) and to Henry at $23.80 (CX 83Z-30)—approximately 10% advantage to Mars.

(4) On May 15, 1957, 24 x 21" sink 23101 to Mars at $16.39 (CX 85Z-53) and to Henry at $17.25 (CX 83Z-30)—approximately 5% advantage to Mars.

(5) On May 15, 1957, "Castle" comb. blue 40352 to Mars at $26.85. (CX 85Z-56.)

On May 19, 1957, "Castle" comb. green 40353 to Henry at $31.55 (CX 83Z-31)—approximately 15% advantage to Mars.

(6) On September 4, 1957, tub 21145 to Mars at $46.27. (CX 85Z-97.)

On August 30, 1957, tub 21145 to Henry at $51.59 (CX 83Z-100)—approximately 10% advantage to Mars.

296 (7) On September 4, 1957, tub 21140 to Mars at $41.94. (CX 85Z-97.)

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56. The witness Blackman indicates this competitive market area to be within a radius of 30 or 40 miles from Philadelphia in Pennsylvania and New Jersey. (Tr. 1101.)

On September 6, 1957, tub 21140 to Henry at $46.19. (CX 83Z-103)—slightly less than 10% advantage to Mars.

(8) On February 28, 1957, tub 21206 to Mars at $77.81. (CX 85Z-7.)

On February 15, 1957, tub 21206 to Nat Friedman Sons at $81.90. (CX 89F)—approximately 5% advantage to Mars.

11. Competition in the sale of plumbing fixtures has been keen in the year 1957, and thereafter. (Tr. 1607, 1608, 1624-1627.) Competition in the resale of such products has also been keen, particularly in the Philadelphia-Camden area. (Tr. 534, 535, 546, 1042, 1055, 1106.) The evidence also establishes that price is a very important competing factor in the plumbing fixture business, and was in 1957. (Tr. 232, 244, 248, 249, 319, 320, 518, 936, 937, 1042, 1043, 1066, 1601, 1627.) In fact, one witness testified that price was the only important factor in the competition between his company and others in the area. (Tr. 1066, 1067.)

12. Furthermore, the margin of profit in the resale of plumbing fixtures appears to be small. (Tr. 530, 531, 534, 535, 1045, 1046, 1109, 1110.) The amount of cash discount of 2% allowed to customers of respondent from various suppliers is an important item to such customers and is essential to a showing of a profitable operation. Such cash discount is important to the purchasers of plumbing fixtures and they take advantage of same as a matter of policy. (Tr. 248, 249, 282, 527, 528, 529, 957, 958, 1045, 1046, 1068, 1069, 1109.)

As illustrative of the foregoing, an official of a wholesaler of plumbing fixtures testified that in the resale of U-R products price was "the important factor". (Tr. 1042.) He also replied to a question as to why his com-

pany took advantage of the 2% cash discount that ". . . it meant a lot of money to us. It was very important that we discount our bills because that is probably where our profit lies". (Tr. 1045, 1046.)

Another wholesaler of plumbing fixtures located in Philadelphia testified that his company, as a matter of policy, always took advantage of the 2% cash discount, and when asked to explain why, he stated:

> "It entered into our profit policy. We needed that two percent." (Tr. 1069.)

297 13. The evidence indicates that purchasers to whom respondent has sold its products in the year 1957 in the Philadelphia-Camden area have been in competition with each other in the resale of such products. (Tr. 222-225, 263, 264, 309-312, 516-518, 520, 540-542, 934, 935, 939, 1038, 1042, 1062, 1064-1066, 1099-1101.) (See also footnote 56.)

14. Respondent is engaged in the production and sale and distribution in commerce, on a nation-wide basis, of its various products, including its U-R line.[57] It maintains plants in California in the West, New Jersey in the East, Wisconsin in the North, and Texas in the South, as well as in Pennsylvania. Its principal place of business is located in Pennsylvania. (Answer to Complaint.) It also maintains a number of district sales offices, one of which is in Philadelphia. (CX 74.) In 1957, the sales office covering Philadelphia was located in Camden, New Jersey. (CX 1.)

In the sale of its products respodnent invoices its customers from the main office at New Castle, Pennsylvania, and insofar as this record shows, all remittances are made to the New Castle office where the general office account is maintained. (See CX 80, as example.)

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57. Findings 1-6 are also applicable to Part II involving U-R line sales.

Respondent is not a series of separate companies operating plants in five different states, but it is one corporation engaged in the interstate business of manufacturing and selling plumbing fixtures. Sales to Camden purchasers are transactions that clear in the general offices in Pennsylvania as a part of the over-all interstate operations of the corporation as it is engaged in commerce. These operations include U-R line interstate sales in the Philadelphia-Camden area as well as Homart.

For example, when respondent sold to Mars Supply Co. (Tr. 303, 304, 309, 310), the complete transaction was an order received usually by or through a salesman of respondent (CX 85A-Z-144) and an invoice was submitted from respondent's home office and the merchandise ordered was usually shipped from the Camden plant of respondent or picked up by Mars at the plant or at a warehouse. An examination of the invoices of sales to Mars during 1957 establishes that the majority of the sales provided for shipment to Mars in Philadelphia. Of approximately 175 invoice transactions shown in the record, about 35 were directed to be shipped to or picked up for the New 298 Jersey store, the remainder covering shipment destined for the Philadelphia address. (CX 85A-Z-144.)

Analysis of Evidence Relating to the Sale of Respondent's U-R Products and Conclusions.

Respondent urges dismissal of the charges set forth in Part II hereof relating to the U-R line of products as distinguished from the Homart line of products on the following grounds:

1. There is a lack of substantial evidence to sustain the charges in the complaint because (a) in many instances no evidence of actual sales at different prices was introduced, (b) in many other instances none of the compared sales were in interstate com-

merce, and (c) in still other instances the compared sales transactions did not involve competing purchasers.

2. There is no evidence upon which to base a conclusion that competition has been or may be, adversely affected as a result of such price differentials that have shown to exist.

Apparently, the respondent assumes that if in some instances no evidence of actual sales at different prices was introduced, in other instances, none of the compared sales were in interstate commerce, and in other instances the compared sales transactions did not involve competing purchasers, these reasons represent appropriate grounds for not holding that there is no substantial evidence to sustain the charges in the complaint. The Commission is not required to adduce evidence of each and every actual sale at different prices. It is sufficient if a substantial number of sales reflect discriminatory pricing. Similarly, with regard to the compared sales being in interstate commerce, it is unessential that every sale be in commerce. As regards respondent's argument that some compared sales transactions did not involve competing purchasers, it is sufficient if a substantial number of sales involve competing purchasers. Indeed, as indicated by the findings, there is substantial evidence of actual sales at different prices; there is substantial evidence of compared sales being in interstate commerce and substantial evidence of the fact that sales transactions involve competing purchasers in
299 the Philadelphia-Camden market area. There is no merit to the respondent's position that each and every purchaser must be specifically identified as the competitor of another although some are. Presumptively purchasers are competitors if they market their products within the same geographical competitive market area (i.e., the Philadelphia-Camden area).

The evidence herein, as demonstrated by the findings, clearly indicates that within the Philadelphia-Camden market area there were purchasers selling wholesale and retail who were receiving preferential prices in amounts below those received by others in the same market area from Universal-Rundle. In this connection, on the issue of jurisdiction, interstate sales and interstate clearances of intrastate sales were demonstrated by the evidence. Also evidenced was the seeking of interstate sales in the Philadelphia-Camden area through newspapers having circulation in that area. See *Progress Tailoring Co., et al.* v. *Federal Trade Commission,* 153 F. 2d 103 and *Ford Motor Company* v. *Federal Trade Commission,* 120 F. 2d 175, 314 U. S. 668.

The ultimate substantive issue to be decided is whether or not the evidence supports the charge that Rundle has violated section 2(a) of the Clayton Act in the sale of its U-R brand plumbing fxtures to its various trade customers by selling to some at lower prices than to others, who are in competition with those receiving the preferential prices.

The record discloses as heretofore found that particularly during the year 1957, respondent sold its U-R products to some purchasers in the Philadelphia-Camden area at prices substantially below those charged by respondent for products of like grade and quality to other competing purchasers in the same market area.

The statute does not require that there be a finding of injury actually having resulted from respondent's different prices, but only that the effect of the prohibited price discriminations may be substantially to lessen competition or to injure, destroy or prevent competition. *FTC.* v. *Morton Salt Co.,* 334 U. S. 37, 46 (1948).

Also in *Moog Industries, Inc.* v. *FTC,* 238 F. 2d 43, 51 (8th Cir. 1956), the court said in part:

"The Commission was not required to show that petitioners' rebate system has in fact adversely affected competition. The language—in the 'effect' clause of the statute—is *may be* substantially to lessen competition * * *." (Italics [underscoring] supplied.) The Supreme Court has repeatedly held that section 2(a) of the act does not require a finding that the discriminations in price *have in fact* had an adverse effect on competition. *Corn Products Refining Co.* v. *Federal Trade Commission,* 324 U. S. 726, 738, 742; *Federal Trade Commission* v. *Morton Salt Co.,* 334 U. S. 37, 46; *Standard Fashion Co.* v. *Magrane-Houston Co.,* 258 U. S. 346, 356, 357. It has also held that "The statute is designed to reach such discriminations 'in their incipience' before the harm to competition is effected. It is enough that they 'may' have the prescribed effect. *Corn Products* case, 324 U. S. at 738."

The court stated further that: "With competition so keen, margins so small, and over-all net profits so low, it was clearly open to the Commission to find that rebates denied to some purchasers (well more than half in all lines) but granted to others, ranging up to 19%, may probably result in substantial injury to competition." (p. 51.)

The evidence further indicates as heretofore set forth in the findings, that the margin of profit is small and the market is highly competitive in selling the product at issue under these circumstances competitive injury may be anticipated if the respondent's pricing practices with regard to the sale of its U-R line of products are allowed to continue. In this connection, however, it should be pointed out that, although injury to secondary line competition may properly be inferred from the substantial evidence adduced, there is an absence of substantial evi-

dence indicative of injury to primary line competition. Therefore, the hearing examiner is compelled to dismiss the complaint insofar as it relates to injury to primary line competition in the sale of U-R products.

It must be concluded, therefore, with regard to respondent's sale of its U-R line of products that the effect of respondent's discriminatory pricing may be to substantially lessen competition or tend to create a monopoly in violation of section 2(a) of the Clayton Act as amended.

As heretofore indicated in Part I hereof, the evidence does not establish that respondent, in selling its Homart line to Sears and Roebuck pursuant to Sears and Roebuck specifications, violated section 2(a) of the Clayton Act, since the U-R line and the Homart line are not products of like grade and quality.

301 The Scope of the Order Relative to Respondent's U-R Brand Products.

Respondent urges that a limited order be issued in view of the fact that if there is a holding by the hearing examiner that discriminatory prices have been granted in the Philadelphia-Camden market area, there is no basis for assuming that discriminatory pricing practices are existent in other markets where the respondent does business. Under this theory, it would be necessary for the Commission to prove discriminatory prices in every market in which the respondent did business in order to issue a broad order covering all markets.

It appears to this hearing examiner that the most realistic approach in determining whether or not a broad or narrow order should be issued is to assume that if discriminatory pricing practices in one geographical market area are substantial, it should be assumed that they are representative of the conduct of a respondent in all the areas in which it does business, unless the circumstances

show or the respondent goes forward with the evidence and shows that such a practice in the market area (or areas) selected by the Commission is (or are) not typical or representative of its practices elsewhere. In the instant case the respondent has not offered any evidence indicative of the fact that the particular market area selected by the Commission represents uncommon or isolated circumstances in the pricing practices of the respondent and it is not otherwise apparent.

In a section 2(a) case, *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. at page 473, the Supreme Court states:

> "In carrying out this function the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be bypassed with impunity. Moreover, '[t]he Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlaful practices' disclosed . . . Congress placed the primary responsibility for fashioning such orders upon the Commission, and Congress expected the Commission to exercise a special competence in formulating remedies to deal
> 302 with problems in the general sphere of competitive practices. Therefore we have said that 'the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.' "[58]

58. This case has been recently cited in *Waltham Watch Company, et al.* v. *Federal Trade Commission,* U. S. Court of Appeals, 7th Circuit, June 5, 1963, in a case involving a deceptive practice.

Accordingly, it is

Order.

Ordered that respondent Universal-Rundle Corporation, a corporation, and its officers, directors, agents, representatives and employees, either directly, or through any corporate or other device, in connection with the sale of plumbing fixtures in commerce, as "commerce" is defined by the Clayton Act, do forthwith cease and desist from:

Discriminating in price by selling "Universal-Rundle" brand or Universal-Rundle manufactured plumbing fixtures (exclusive of the "Homart" brand sold to Sears, Roebuck & Co.) of like grade and quality to any purchaser at prices higher than those granted any other purchaser, where such other purchaser competes in fact with the unfavored purchaser in the resale or distribution of such products.

and it is

Further Ordered that that part of Paragraph Six of the complaint which by alleging competition between respondent and respondent's competitors, may be deemed to allege primary injury as a result of alleged discrimination in price is herein and hereby dimissed, and it is

303 Further Ordered that the charges set forth in the complaint relative to the sale by respondent of its "Homart" brand of products to Sears and Roebuck Company are herein and hereby dismissed.

Edgar A. Buttle,
Hearing Examiner.

October 28, 1963.

555 BEFORE FEDERAL TRADE COMMISSION.

* * (Caption—8070) * *

Commissioners:

Paul Rand Dixon, Chairman,
Philip Elman
Everette MacIntyre,
John R. Reilly.

FINAL ORDER.

Respondent and counsel in support of complaint having filed cross appeals from the initial decision of the hearing examiner, and the matter having been heard on briefs and oral argument; and the Commission, for the reasons stated in the accompanying opinion, having granted in part and denied in part respondent's appeal and having denied the appeal of counsel in support of complaint, and having modified the initial decision to conform with the views expressed in said opinion:

It Is Ordered that the hearing examiner's initial decision as modified be, and it hereby is, adopted as the decision of the Commission.

It Is Further Ordered that respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist.

By the Commission.

Joseph W. Shea,
Secretary.

Issued: June 12, 1964.

Attached is: (1) Opinion of the Commission by Commissioner Reilly.

556 BEFORE FEDERAL TRADE COMMISSION.

* * (Caption—8070) * *

Commissioners:

Paul Rand Dixon, Chairman,
Philip Elman,
Everette MacIntyre,
John R. Reilly.

OPINION OF THE COMMISSION.

By Reilly, Commissioner:

The complaint herein charges respondent, a manufacturer of plumbing fixtures, with violating Section 2(a) of the amended Clayton Act. The matter is now before the Commission on cross appeals from the hearing examiner's initial decision.

Specifically, the complaint alleges that respondent violated Section 2(a) by:

1. Selling plumbing fixtures to Sears, Roebuck and Co. under Sears' "Homart" brand at lower prices than it sold plumbing fixtures under its own "U-R" brand to competitors of Sears, and
2. Selling plumbing fixtures under its own brand at different prices to purchasers competing in the resale of such fixtures.

The hearing examiner dismissed the allegation concerning sales to Sears, holding in his initial decision that counsel supporting the complaint had failed to prove that the plumbing fixtures sold to Sears for resale under the "Homart" brand were of like grade and quality with 557 fixtures sold by respondent under its own brand.[1] He

1. The issue of like grade and quality was severed from all other issues in the proceeding by order of the hearing examiner, and this is the only issue before the Commission insofar as respondent's transactions with Sears are concerned.

ruled that the allegation with respect to price discrimination in the sale of plumbing fixtures under respondent's own brand had been sustained by the evidence and he included in his initial decision an order prohibiting this practice.

Appeal of Counsel Supporting the Complaint.

The principal question raised by this appeal is whether the examiner erred in holding that the evidence failed to establish that plumbing fixtures sold by respondent to Sears and those sold under respondent's own brand were of like grade and quality.

In presenting this phase of their case, complaint counsel selected seven "Homart" fixtures for comparison with their counterparts in the "U-R" line. These fixtures are one recess enameled cast-iron bathtub, one enameled cast-iron corner bathtub, one one-piece vitreous water closet, two cast-iron kitchen sinks, and one vitreous china water closet tank plus a vitreous water closet bowl from each brand.

The hearing examiner found, and these facts are undisputed, that the raw materials used by respondent in the production of the "Homart" line for Sears are the same as those used in the production of the "U-R" line of fixtures, although different amounts of such materials are used, and that the same manufacturing operations are employed in producing both lines. He nevertheless concluded, after making a detailed comparison of each pair of fixtures selected by counsel supporting the complaint, that because of the "actual and genuine physical differentiations" between the products in the two lines they could not be considered to be of like grade and quality.

In comparing the 4½-foot enameled cast-iron bathtubs, for example, the examiner found that the "U-R" product was 16 inches in height, whereas the "Homart" was 15

inches. He noted in this connection that various purchasers of plumbing fixtures, including wholesalers, dealers 558 and plumbers, had testified without exception that it is an accepted industry practice for the price of a bathtub to be dependent upon the height of the tub. The examiner also found that the "U-R" tub was 2¾ inches wider than the "Homart", that its enameled area was more than two square feet greater, and that it had a ¾ inch higher water level. He further found that the "U-R" tub conformed to commercial standards adopted by the industry, whereas the "Homart" tub did not.

The record also shows, and the hearing examiner has found, that the "U-R" tub was constructed with a wide front apron forming a 6½ inch seat and that it had two built-in soap dishes. The Sears product on the other hand had neither the seat nor the soap dishes. The examiner also took into consideration the difference in the design of the two bathtubs, pointing out that the "Homart" tub, unlike the "U-R", was constructed with an unbroken straight line at the floor level of the front apron so that it could be more easily installed by the "do-it-yourself" class of customers to whom Sears sold.

Relying upon the testimony of various members of the trade, the examiner found that certain of the characteristics of features found in the "U-R" line, but not in the "Homart", made the product more desirable to the consumer and hence enhanced its marketability. He also found on the basis of this testimony that certain features of some of the "U-R" products improved their functional utility. Having found that the physical differences between the two lines were not merely artificial or fanciful, he ruled that counsel supporting the complaint had the burden of proving that, notwithstanding these differences, the products were of like grade and quality, or stated differently, that these variations did not affect the grade

and quality of the compared products. He held that counsel had failed to sustain this burden.

Counsel supporting the complaint do not challenge the examiner's findings that physical differences exist between the compared products nor do they deny that such differences affect the marketability of the products. They contend however that the fact that the differences in the products are such that one can command a higher price than the other does not create a difference in grade or quality. To support this argument they cite *In the Matter of The Borden Co.*, Docket 7129 (Final Order 1-30-63) wherein the Commission rejected a contention that goods were
559 not of like grade and quality because one item was regularly marketed at a higher price than another.[2]

Counsel's argument, as we understand it, is that physical differences which enhance the marketability of a product are not of sufficient importance to change or affect the grade or quality of that product since the Commission has held in the *Borden* case that branded and unbranded goods were of like grade and quality even though the branded article was regularly marketed at a higher price than the unbranded one. We find no merit in this argument. In the *Borden* case the compared products were physically identical and sold at different prices. Here the products are physically different and sell at different prices. The only similarity between the two cases is that the products compared in each sell at different prices.

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2. Counsel also refer to the Report of the Attorney General's National Committee to Study the Antitrust Laws (1955) wherein the majority expressed the view that branded and unbranded commodities should be considered of like grade and quality despite the fact that the public is willing to pay more for one than the other and that "tangible consumer preferences as between branded and unbranded commodities should receive due legal recognition in the more flexible 'injury' and 'cost justification' provisions of the statute".

The issue here is whether a showing of physical variations between two products of such a nature as to create a consumer preference for one over the other will support a conclusion that the two products are not of like grade and quality. Counsel supporting the complaint does not meet this issue but argues instead that the products should be considered of like grade and quality despite these physical differences claiming that under *Borden* a difference in marketability has no bearing on the question of like grade and quality. The fallacy of this argument however is that the holding in *Borden* related only to a comparison of intrinsically identical products. That case held that differences in brands affecting consumer preference or marketability of such products could be disregarded in applying the "like grade and quality" test. It does not support the contention of counsel supporting the complaint that physical differences in products which affect consumer preference or marketability can also be disregarded. Such an interpretation of the statute would ignore the physical test of like grade and quality and bring within the purview of Section 2(a) transactions involving goods which may be of completely different grade or quality. The argument of counsel supporting the complaint is therefore rejected.

560 Respondent's Appeal.

As stated above, the examiner found that respondent had discriminated in price in the sale of plumbing fixtures under its "U-R" brand and that such discriminations had had the proscribed effect on competition at the buyer level. All evidence adduced by complaint counsel in support of this charge related to sales made by respondent to cus-

tomers located in Philadelphia, Pennsylvania, and Camden, New Jersey.[3]

Respondent contends first of all that the examiner erred in holding that sales to purchasers located in Camden, New Jersey were "in commerce" pointing out that all products involved in these transactions were manufactured by respondent at its cast-iron and vitreous china manufacturing plants located in Camden and were either delivered directly to the purchaser's place of business or were picked up by the purchaser at respondent's Camden plants. The examiner's holding on this point is based upon the finding that all sales by the Camden plants to purchasers located in New Jersey are "cleared" through respondent's principal office in New Castle, Pennsylvania. We agree with respondent that this finding is not supported by the record. Insofar as we can determine from our review of the evidence, New Jersey purchasers place their orders directly with the Camden plants (sometimes for delivery on the same day) and are invoiced from respondent's Camden office. There is no proof that these transactions are cleared through New Castle nor does the record show, as contended by complaint counsel, that respondent's entire manufacturing and sales operations are subject to the direct supervision and control of respondent's main office.[4]

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3. The period selected by complaint counsel to prove unlawful price discriminations was limited to the year 1957. Respondent agreed not to raise the defense that evidence relating to its activities during that time is moot.

4. The principal evidence upon which counsel rely to support this argument is general testimony of respondent's vice president in charge of manufacturing that he was "charged with the responsibility of all manufacturing at Universal-Rundle" and that he participated with other industry members in drafting commercial standards for plumbing fixtures which, according to complaint counsel, "directly dictate the course of U-R's manufacturing operations."

We hold therefore that the examiner erred in finding that respondent's sales from its Camden plants to pur-
561 chasers located in New Jersey were sales in interstate commerce.

The record shows, however, that sales were made from respondent's Camden plants to purchasers located in Philadelphia. Respondent does not deny that these sales were in commerce but contends that its customers located in Philadelphia did not compete with customers located in Camden and that the examiner erred in finding that Philadelphia and Camden were in the same market area. It is unnecessary for us to determine whether all of respondent's customers in these two cities competed with each other or whether Philadelphia and Camden form one trading area insofar as the sale or resale of plumbing supplies is concerned since the record is clear, and respondent concedes, that its favored customer, Mars Supply Company, located in Philadelphia, competed with non-favored customers also located in Philadelphia.[5] The record is equally clear that Mars Supply Company also competed with respondent's non-favored purchasers in New Jersey through a branch outlet located in the Camden area.[6]

5. Respondent states in its brief that its contention with regard to the lack of competition due to the absence of geographic proximity is directed solely to the proposition that purchasers in Camden are not in competition with purchasers in Philadelphia and vice versa.

6. Respondent contends that the plumbing fixtures resold by the New Jersey branch of Mars were invoiced separately by respondent and shipped directly from respondent's Camden plants to the Mars New Jersey location. The record reveals that the plumbing fixtures in question were invoiced to Mars Supply Company of Philadelphia for delivery in New Jersey. Whether or not these shipments were in commerce, it is clear that Mars was competing with respondent's non-favored customers in New Jersey through a branch outlet and that Mars' cost

The next issue raised by this appeal is whether respondent's favored and non-favored customers were competing at the same distributional level. Respondent argues that its favored customer, Mars, was a "DTU", a trade
562 term for a dealer or retailer selling directly to the ultimate consumer, whereas its non-favored customers were wholesalers selling to plumbers and plumbing contractors. Respondent contends therefore that it was incumbent upon counsel supporting the complaint to prove that the "DTU" was competing with plumbers purchasing from the non-favored wholesalers and that such competition was adversely affected by respondent's price discriminations.

We find no merit to this argument since it ignores the showing of substantial competition between "DTU's" and wholesalers in the resale of plumbing fixtures to the public. While it is true that Mars engaged in consumer advertising and the wholesalers did not, it is clear that consumer sales were an important segment of the wholesalers' business. Almost without exception, the various non-favored wholesalers testified that they sold plumbing fixtures directly to the public and, in some instances, most of their sales were of this type. As a matter of fact, there appears to be little difference between the "DTU's" and many of the so-called "wholesalers". The similarity between the two as shown in this record is perhaps best described by the following testimony of respondent's vice president, Blackner:

> "Many so-called DTU's who are wholesaler-retailers like to consider themselves wholesalers, because that is a step above the DTU. It carries more legitimacy; so although a businessman in the plumbing supply

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of acquiring its inventory of "U-R" fixtures was reduced by reason of the lower discriminatory prices it received on purchases which respondent concedes were made in interstate commerce.

business may sell a majority of hix fixtures directly to the consumers and a very small percentage to a plumbing contractor, he still likes to be called a wholesaler. There is a very fine line of demarcation. . . ."

The argument that there was no showing of competition in the resale of respondent's products is rejected.

Respondent has also taken exception to the examiner's finding of competitive injury, contending that the lower prices in question were not arbitrarily granted to certain purchasers and denied to others but were available to any purchaser choosing to order a truckload of respondent's plumbing fixtures. Since it emphasizes the fact that the only price differential involved in this matter was the difference between truckload and less than truckload prices and since it criticizes the examiner for failure to mention this fact in his initial decision, it is apparently respondent's position that truckload discounts are less likely to cause competitive injury than other types of discounts.

563 It also points out in this connection that with the exception of *Morton Salt*[7] there have been few cases involving violations of Section 2(a) by reason of truckload or carload discounts.

In determining whether respondent's price discriminations have had the requisite effect on competition, the fact that a truckload discount is involved is significant only because it is a type of discount offered to all purchasers and, theoretically at least, is available to all. As stated by the Court in *Morton Salt* "a 10-cent carload price differential against a merchant would injure him competitively just as much as 10-cent differential under any other name" and "[S]ince Congress has not seen fit to give carload discounts any favored classification we cannot do so." If, however, the non-favored customers were fully able to avail

7. *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37 (1948).

themselves of the truckload discount, as respondent contends, it would be difficult to infer competitive injury from the showing that they purchased in smaller quantities, and at a higher price, than competitors who took advantage of the discount. But, contrary to respondent's contention, the testimony of various non-favored wholesalers discloses that truckload quantities were beyond their buying capabilities.[8] As a matter of fact, the total annual purchases of "U-R" products by several of the non-favored customers were less than the smallest order shown in the record which qualified for a truckload discount.

Respondent states in its reply brief that the witnesses representing such non-favored purchasers also testified that they purchased fixtures from other manufacturers in addition to respondent, thereby implying that these purchasers were not "small struggling concerns unable to take advantage of the discounts in question". The record shows, however, that during the relevant period many of the firms in question purchased all or most of their plumbing fixtures from respondent.

564 Another argument made by respondent in opposition to the examiner's finding of competitive injury is that favored customer Mars did not purchase all of its requirements in truckload quantities and consequently purchased some "U-R" products at the higher, less-than-truckload price. We fail to see the relevance of this point since it is undisputed that most of respondent's sales to Mars during the period under consideration were made at lower prices than sales to non-favored purchasers competing with Mars.

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8. For example, one of the partners in Nat Friedman's Son's, a non-favored purchaser, testified as follows:

Q. Did you ever buy plumbing fixtures in truckloads?

A. We did not.

Q. Why not?

A. Lack of space and lack of money.

Respondent also contends that the evidence does not support the conclusion that price differentials ranging up to 15%, as found by the hearing examiner, would have the defined effect on competition in the resale of plumbing fixtures. While respondent concedes that the probability of competitive injury may be inferred from a showing as to the substantiality of the price differences, it argues that there is no factual basis for finding that the differentials involved in this proceeding were substantial, i.e., of sufficient magnitude to give the favored purchasers a significant competitive advantage over their non-favored rivals.

One test for determining the substantiality of a price differential in a secondary line case is whether, in the competitive situation shown to exist, the differential is sufficient, if reflected in the resale price of the commodity, to divert business from one dealer to another. *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U. S. 726 (1945). The record clearly shows, in this connection, the competitive conditions existing at the buyer level, and the testimony of numerous purchasers of respondent's plumbing fixtures establishes beyond question that price competition in the resale of such products was extremely keen. An official of one such customer, Henry Supply Company, testified as follows:

> A. . . . There is a class of customers who wants the finest of merchandise, good quality, and they are willing to pay for it, and then we have a class of people who want the cheapest thing that they can get regardless of quality.
>
> For instance, they bought a property and they want to put a bathroom in it and it is an investment and they want to get away with as small an investment as possible. They will come in and get my price on whatever it is, a three piece bathroom, and if I am low
> 565 enough, I will get the sale. And they are not afraid to tell me whether I am high.

Q. Are these—would these be consumers or plumbers?

A. Both. Both consumers or plumbers.

• • • • •

Q. Mr. Schreibstein, in dealing with your customers on the floor of your store, do you have any knowledge as to whether they were concerned about the price of the products?

A. Whether my customers were concerned with the price?

Q. Yes.

A. And how.

Q. Did they make any comparisons of the prices of your—

A. Yes, they do.

Q. —prices—with others?

A. Yes, they do. I nmost instances they do.

Another customer gave similar testimony:

Q. What factors were important in the sale of thoes fixtures?

A. Do you mean price?

Q. Well, was that one of the factors?

A. Well, that is the important factor.

• • • • •

Q. You testified on direct examination that price was one of the important factors in selling plumbing fixtures. What other factors are important other than price?

A. I don't know.

566 A partner in Nat Friedman's Sons, a non-favored purchaser, testified.

Q. . . . On the basis of the conversations which you had with these customers, did you form any opinion as to what the principal factors of competition were between your company and the other companies which were selling to similar people in your area?

A. Yes.

Q. What did you believe that those factors were, sir?
A. Merely price.

Q. Were there any other factors which were of significance in your judgment?
A. None whatsoever.

An official of Black and Brown testified:

A. It seems to be characteristic of our business that you are always in competition . . . on prices and from other situations. You may not always hear your competitor's name. But your customer may tell you "well, you are so and so much higher than your competition", or you don't get the order and you don't know why you didn't get the order.

The record shows in this connection that favored customer Mars received price differentials of up to $5.00 on items sold by Universal-Rundle at prices ranging from approximately $20 to $80. On the basis of the testimony as to the intensity of price competition at the dealer level we find that these differentials if reflected in the resale price of the various plumbing fixtures would have been
567 sufficient to divert business from non-favored customers to Mars.[9]

Respondent also challenges the examiner's reliance on evidence concerning the importance of the 2% cash discount in finding competitive injury. It points out in this connection that the record does not disclose the net profits realized by respondent's customers and contends that the "two per

9. See also *Morton Salt, supra* (at page 47) wherein the Court stated:

"That respondent's quantity discount did result in price differentials between competing purchasers sufficient to influence their resale price of salt was shown by the evidence. This showing in itself is adequate to support the Commission's appropriate findings that the effect of such price discriminations 'may be substantially to lessen competition . . . and to injure, destroy and prevent competition'."

cent inferred effect theory" is applicable only when the two per cent is compared with the buyers' margin of profit. We do not agree. While the Commission has in some cases compared net profits with cash discounts to emphasize the importance of the latter, a similar showing can also be made by testimony of both favored and non-favored purchasers, who, being familiar with existing competitive conditions, are in a position to state whether the cash discount is important. In the final analysis a determination as to the probability of competitive injury from such a showing must be made by comparing the cash discount with the price differential.[10] Where, for example, the evidence 568 reveals that purchasers consider the cash discount to be an important element insofar as their ability to compete is concerned, it may be readily inferred that a larger discount would have more than an inconsequential effect on competition among them if granted to some and denied to others.

As stated above, the differentials involved herein ranged up to 15% and averaged about 10%. One non-favored customer testified as follows in response to a question as to why his company took advantage of the 2% cash discount:

> "Well, it meant a lot of money to us. It was very important that we discount our bills because that is probably where our profit lied."

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10. As was stated in the Commission's opinion in *Moog Industries, Inc.*, 51 FTC 931 (1955), aff'd, 328 F. 2d 43 (1956):

> "The substantiality of respondent's price differences and the probability of injury to competition can best be shown by comparing it with the competitive effect of the amount represented by respondent's standard 2% discount for cash given to all customers. Distributors of respondent testified that they invariably took advantage of this 2% cash discount and that this discount was essential to the conduct of their respective businesses. . . ."

Another customer testified that the cash discount "entered into our profit policy. We needed that 2%". Another non-favored customer testified that his company's gross profit on plumbing fixtures ran between 10% and 15% and testified as follows on cross-examination as to the importance of the cash discount:

> Q. Mr. Tepper, is the reason you take the two per cent cash discount basically because if you do not take that discount, your lines of credit will be jeopardized?
>
> A. No. That represents a margin of profit without moving a truck or doing any additional paperwork or handling, and two per cent in our line, which is very competitive, is a big item.

From our review of all the evidence we are convinced that the price differentials involved in this proceeding were sufficient to give the recipients of the lower prices a substantial advantage over their non-favored competitors. Consequently we find no error in the examiner's holding that these discriminations had the prescribed effect on competition. Respondent's argument is therefore rejected.

Respondent's final argument concerns the scope of the order to cease and desist contained in the initial decision. Respondent urges that the order be limited so as to prohibit only the granting of truckload discounts to purchasers located in Philadelphia and Camden. As to the request for geographic limitation, respondent does not dispute that its policy of grant truckload discounts applies to all sales
569 throughout the nation, but argues that there is no evidence that the circumstances shown to exist in Camden and Philadelphia exist elsewhere in the country. In this connection, it contends that the purchasers in Camden and Philadelphia who bought in less than truckload quantities did so because they were so close to the respondent's plants that they could use them as their warehouse. It may be inferred therefore, according to respondent that purchasers

farther away from these plants always buy in truckload quantities in order to maintain an adequate inventory of plumbing fixtures. The obvious error in this reasoning, however, is the premise that purchasers in Camden and Philadelphia bought less than truckload quantities solely because they had easy access to respondent's plants. As stated above, the record establishes that a number of respondent's non-favored customers purchased in less than truckload quantities because they were unable to buy in larger quantities. The argument that the order should be limited to transactions in the Philadelphia and Camden area is, therefore, rejected.

Respondent has offered no reason why the order should prohibit only differentials between truckload and less than truckload prices and we can think of none.

To the extent indicated herein respondent's appeal is granted and in all other respects it is denied. The appeal of counsel supporting the complaint is denied. The initial decision is modified to conform with the views expressed in this opinion and, as so modified, will be adopted as the decision of the Commission.

June 12, 1964

570 BEFORE FEDERAL TRADE COMMISSION.

* * (Caption—8070) * *

RESPONDENT'S PETITION FOR WITHDRAWAL OF COMMISSION'S ORDER TO CEASE AND DESIST AND REQUEST FOR ENTRY OF ORDER STAYING THE EFFECTIVE DATE OF THE CEASE AND DESIST ORDER.

Comes Now respondent, Universal-Rundle Corporation, and by filing of this petition hereby respectfully requests the Commission to take the following action:

A. Withdraw the Commission's order to cease and desist entered against and served upon respondent on June 26, 1964; and

B. Simultaneously enter a further Commission order staying re-entry of said order to cease and desist.[1]

Respondent further requests, for the reasons indicated below, a hearing before the Commission prior to the Commission's action on this petition and for a temporary stay of the order to cease and desist pending the Commission's decision on the instant petition.

Respondent hereby agrees, on filing of this petition, not to seek any review in a United States Court of Appeals, of the Commission's order to cease and desist as heretofore entered, or of the Commission's proceedings in connection therewith provided (1) the Commission grants this petition, (2) the Commission does not re-enter the said order without at least 30 days prior notice to respondent of

1. The Commission's order to cease and desist would become final on August 27, 1964, unless the effective date thereof is stayed by the Commission, or unless prior to August 27, 1964 respondent files a written petition in a United States Court of Appeals seeking dismissal of the Commission's complaint.

its intention to do so, (3) the Commission gives respondent the opportunity to submit, in written form, reasons why said order should not be re-entered, and (4) no re-entry of the cease and desist order will be made until expiration of at least eighteen months after August 27, 1964.[2]

Respondent requests this stay of the Commission's order to permit the Commission sufficient time to investigate and institute whatever proceedings are deemed appropriate by the Commission to correct the industry-wide practice by plumbing fixture manufacturers of granting discounts in prices on truckload shipments. Such a stay, when followed by appropriate action by the Commission to place all manufacturers in this industry on the same competitive
572 basis, would avoid the obvious competitive disadvantage and extreme hardship under which respondent would otherwise have to compete and minimize the probability of any substantial decline in respondent's sales volume which would be a consequence of the Commission's order.

In support of this petition, respondent submits the following:[3]

(a) An Affidavit of its Vice President in Charge of Marketing, together with Exhibits A-AA through F-FF attached thereto which are current price lists of competitors showing to some extent the industry-wide practice of granting truckload discounts; and

(b) Information indicating the degree of concentration

2. Nothing contained in this petition is to be construed as an admission by respondent that it has violated Section 2(a) of the Amended Clayton Act in the event the relief requested herein be denied or any other proceeding is filed in which charges are made under this Section of the Act.

3. Exhibits submitted as a part of both this petition and those attached to the Evans affidavit are included with only five of the 20 filed copies of this petition, in view of the number of documents involved.

in this industry, with a showing of the financial losses of respondent as compared to the profit of other plumbing fixture manufacturers who are free to continue, and are in fact engaging in, the practice for which this respondent has been placed under an order to cease and desist.

The Affidavit of respondent's Vice President states in effect that if this respondent must adjust its pricing practices to conform with the order entered by the Commission and thereby eliminate differentials in price between truckload and less than truckload shipments, which are currently being granted by its competitiors, it will have the direct effect of substantially reducing its sales volume, with a corresponding shift to its competitors of respondent's decreased volume and contribute to further financial losses of respondent.

573 Respondent has prepared and marked as Exhibits 1 through 6 to this petition summary sheets showing the specific truckload discounts on certain products, as reflected by the competitors' price lists and bulletins which are a part of its Vice President's affidavit, and which sheets also set forth the average discounts of each competitor on truckload shipments. The Commission's attention is respectfully invited to these exhibits which clearly show that—

1. American Standard has a so-called "Distributor Inventory Purchase Plan" whereby discounts ranging from approximately 14% to 23%, and averaging approximately 18%, are granted to its customers provided the customer purchases in truckload quantities. (Exhibit 1 to this petition, and Exhibits A through AA to Evans' affidavit.)

2. Elger Division of The Murray Corporation of America grants truckload discounts ranging from approximately 14% to 23%, averaging approximately 18%, to a buyer of truckload quantities as compared to a customer buying in

less than truckload quantities. (Exhibit 2 to this petition, and Exhibits B through BB to Evans' affidavit.)

3. Rheem Manufacturing Co. grants its truckload buyers discounts ranging from approximately 14% to 23%, or an average truckload discount of approximately 17.5% as compared to the price charged other buyers purchasing identical fixtures in less than truckload quantities. (Exhibit 3 to this petition, and Exhibits C through CC to Evans' affidavit.)

4. Briggs Manufacturing Company's truckload dis-574 counts range from 7% to approximately 18%, for an average of approximately 13% on truckload shipments. (Exhibit 4 to this petition and Exhibits D through DD to Evans' affidavit.)

5. Kohler Co. sells certain of its plumbing fixtures in truckload quantities, granting discounts ranging from approximately 14% to 22% and averaging approximately 18% (see paragraph 6 of Evans' affidavit; Exhibits E through EE to Evans' affidavit, and Exhibit 5 to this petition).

6. Crane Co. grants discounts to truckload buyers on certain of its plumbing fixtures ranging from approximately 14% to 22%, averaging 18%. (Exhibit 6 to this petition and Exhibits F through FF of Evans' affidavit.)

In considering the substantiality of the differential in price by respondent's competitors for truckload shipments compared to their prices on less than truckload shipments, the Commission's attention is specifically invited to its opinion in the instant case where Commissioner Riley ruled that the probability of secondary line competitive injury was established when this respondent's truckload discounts "ranged up to 15% and averaged about 10%" (pp. 9, 13 of the Commission's opinion).

Respondent respectfully submits that these Exhibits and underlying price lists of its competitors which show price

load discounts where they do not operate to discriminate in price as between competing customers.

We suspect that respondent had a good reason for awaiting the conclusion of the regular hearings in this matter before presenting the instant petition. The factual premise underlying the petition is refuted by the testimony of respondent's own vice president adduced by respondent's counsel. Thus, the witness Backner testified that, subsequent to 1957, respondent discontinued selling to Mars Supply Company, Henry Arensberg, Nat Friedman & Sons and Black & Brown (Tr. 1502-1505), four of the ten accounts involved in this proceeding with respect to respondent's proved unlawful pricing. Mr. Backner testified further:

> Q. Can you state the reasons why Universal-Rundle decided to terminate these customers?
>
> A. That type of customer was not profitable to us. We needed a customer who handled a more complete line than that type of customer was willing to buy. They picked up at our plants. That type of operation is very, very expensive to the company. We prefer to ship in truckload lots.
>
> Hearing Examiner Buttle: You mean you established a policy of doing what?
>
> The Witness: Of getting a better type of distributor than the distributors than we had.
>
> 845 Hearing Examiner Buttle: What do you mean by a better type of distributor?
>
> The Witness: Who is capable of handling more of the items we manufactured.
>
> Hearing Examiner Buttle: A more extensive line?
>
> The Witness; More extensive line, and more profitable items. Our experience with these—
>
> Hearing Examiner Buttle: And who would buy in larger volume?
>
> The Witness: That is right, sir. And who would not have to send us his truck around to pick up his entire purchase from our plant.

Hearing Examiner Buttle: You wanted to sell to larger volume buyers, is that what you're telling me?
The Witness: That is right sir. (Tr. 1507-1508, emphasis supplied.)

Thus, respondent has already commenced cutting off those accounts which were incapable of ever purchasing in truckload quantities. If respondent in fact discontinues sales to all accounts which are unable to purchase in truckload quantities the sole question under the order would be whether the order is violated by a truckload sale at truckload price to one account when another account capable of truckload purchases contemporaneously purchases a lesser quantity at a higher price although on other occasions purchases truckloads at the lower rate. Although we are not prepared to concede at this time that such a transaction necessarily would not violate the order, it would certainly give rise to a valid question of interpretation of the order. For such situations the Commission has devised an advisory opinion procedure. Until respondent is advised that such a transaction would violate the order, it can have no basis for a claim that the order would operate to its competitive detriment in the light of the testimony cited above.

It is, therefore, clear that respondent's petition is merely a transparent attempt to create a "back door" defense
846 of meeting competition, is not predicated upon any competitive exigency which may genuinely be apprehended at this time, and should be denied.

Respectfully submitted,

Lewis F. Depro,
Stanley M. Lipnick,
Counsel Supporting Complaint.

July 27, 1964.

847 BEFORE FEDERAL TRADE COMMISSION.

* * (Caption—8070) * *

Paul Rand Dixon, Chairman
Philip Elman
Everette MacIntyre
John R. Reilly

ORDER DENYING RESPONDENT'S PETITION.

This matter has come before the Commission on a petition filed by respondent on July 20, 1964, requesting that we withdraw the order to cease and desist issued in this proceeding on June 26, 1964, and stay the re-entry of said order and further requesting that we grant a hearing on the petition and stay the order to cease and desist pending decision on the petition. An answer in opposition to this petition has been filed by complaint counsel.

Respondent contends in support of its request for withdrawal of the order to cease and desist that there is an industry-wide practice by plumbing supply manufacturers of granting discounts on truckload shipments and that inasmuch as it is prohibited by the order from granting such discounts it will be placed in an adverse competitive position. Respondent has also submitted information to the effect that it has incurred losses in the operation of its business since 1961 and that certain of its competitors have realized profits during that period. It requests therefore that the order be withdrawn until the Commission has taken the necessary steps to correct the practice complained of.

The principal basis for respondent's petition seems to be that the granting of truckload discounts by its competitors is illegal per se under Section 2(a) of the amended Clayton Act. There is nothing in our decision to support this contention, however, nor does the order to cease and

desist entered against respondent absolutely prohibit it from granting truckload discounts. While the practice of granting such discounts may under certain circum-
848 stances, such as those shown in the record of this proceeding, result in price discriminations having proscribed competitive effects, the practice is not necessarily illegal as indicated in respondent's petition. In this connection, it must be determined in each case whether the discount creates a price difference, whether the recipient of such a discount is competing at the same functional level with a customer paying a higher price, whether the customer buying in less than truckload quantities is able to avail itself of the truckload discount, and whether the differential is sufficient in the competitive conditions shown to exist to have the requisite anticompetitive effects. Moreover, even if a prima facie violation of Section 2(a) is established, the seller may in each case interpose the statutory defense to justify the discrimination.

Consequently, the general allegation by respondent that its competitors are granting truckload discounts is not a sufficient basis for instituting industry-wide proceedings to condemn this practice nor is it a valid reason for withholding enforcement of the order entered against respondent in this matter. Moreover, the fact that respondent may have incurred losses prior to the issuance of the order does not support the contention that enforcement of the order will cause it financial hardship.

For the foregoing reasons the Commission is of the opinion that respondent has failed to make a showing which would warrant granting the relief requested:

It Is Ordered that respondent's petition for withdrawal of the order to cease and desist and request for entry of an order staying the effective date of the cease and desist order be, and it hereby is, denied.

By the Commission,

Joseph W. Shea,
Secretary.

Issued: August 4, 1964

849 BEFORE FEDERAL TRADE COMMISSION.

* * (Caption—8070) * *

RESPONDENT'S REPLY TO COMPLAINT COUNSEL'S ANSWER IN OPPOSITION TO PETITION FOR STAY OF ORDER TO CEASE AND DESIST.

Comes now respondent in reply to Complaint Counsel's answer to respondent's petition to stay the effective date of the Commission order to cease and desist, and states as follows:

1. Complaint Counsel plead that "[T]he defect inherent in respondent's argument" is in its "failure to demonstrate or even to allege that its competitors are . . . selling to accounts, buying in truckloads and to competing accounts buying entirely in less than truckloads." (Emphasis *not* supplied.) The Commission's attention is respectfully invited to paragraph 8 of Mr. Evans' affidavit of July 17, 1964, which was submitted with respondent's Petition, wherein it is stated, in part, "In most of the larger trading areas of the country [respondent's competitors distribute fixtures] in the manner in which respondent sold its . . . fixtures in Philadelphia, Pennsylvania and in Camden, New Jersey, during the year 1957 in that the competitors sell . . . fixtures to two or more customers, some of whom 850 may not purchase in truckload quantities." In short respondent, by affidavit has charged that its competitors now sell plumbing fixtures to competing customers on the same basis and in the same manner respondent did in 1957 and, as is disclosed by this record, this practice was found unlawful by this Commission. Thus, the claimed "inherent defect" is Complaint Counsel's oversight of paragraph 8 of the accompanying affidavit.

2. Respondent is apparently subject to criticism, at

least by Complaint Counsel, for its failure to characterize competitors' truckload discounts as "unlawful". (Answer at page 2.) Respondent respectfully submits that expertise in interpreting the Robinson-Patman Amendments to the Clayton Act lies with this Commission and the reviewing courts and it is hardly respondent's function to render a finding on the legality of its competitors' distribution practices, although such practices are identical to the practice which was the basis of the Commission's order entered in this proceeding.[1]

3. We agree with Complaint Counsel's inference (Answer paragraph 1, page 2) that competitors' invoices reflecting shipments at the higher less than truckload prices, and lower truckload prices, rather than price lists and special price bulletins would be the better evidence in
851 establishing differential pricing by its competitors between competing purchasers. Respondent, however, has no power of subpoena nor would it dare to seek such evidence from its competitors. Respondent therefore submits the price lists, price bulletins, and affidavit of its Vice President to support its petition for a Stay and will rely upon Complaint Counsel "as persons charged with some responsibility for the enforcement of the antitrust laws." (Answer, page 3) to take the necessary initiating steps to obtain compliance with the law by members of this industry.

4. Respondent's failure to introduce any evidence in support of a 2(b) defense in this proceeding is due solely to the fact that the Complaint in this matter was issued in August 1960 and was based upon sales made in 1957, with the case tried before a Hearing Examiner in October 1962.

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1. Respondent's footnote 2 on page 2 of its Petition merely avoids any possible interpretation by a reviewing court that respondent's concession not to seek a review of the Commission proceeding might be construed as a tacit admission of violation of law.

Thus, respondent was unable in *1962* to prove the essential elements of a 2(b) defense with regard to sales made some five years prior to trial.[2]

5. For some reason, unexpained in the Answer, it is "noteworthy" that respondent for some four years after issuance of the Complaint did not bring the industry-852 wide practice of granting truckload discounts to the attention of this Commission. This presupposes that evidence at the time of trial was available or obtainable even in the form of price lists concerning the practice of its competitors. The Commission's attention is respectfully invited to the Exhibits which were made a part of respondent's Vice President's affidavit which demonstrate that the truckload discounts granted by its competitors were for the most part effected in July 1963. This case, as was noted above, was tried before the Hearing Examiner in October 1962, and for all practical purposes, the record was closed in early November 1962. Respondent did not know at the time of trial, the precise truckload discounts its competitors were granting as *none published* such discounts but granted them through invoice deductions. It is only for this reason that respondent did not heretofore bring this industry-wide practice to the attention of this Commission.

6. Complaint Counsel characterize respondent's commitment not to seek a review of the Commission's proceeding, or in other words, to waive its statutory right to such a review, as "the most stringent of terms" for non-enforce-

2. The Answer supplies a startling but erroneous reason for respondent's failure to introduce evidence in support of a 2(b) defense. ". . . the reason may have been the simple fact that such competitive truckload discounts as are in existence are not discriminatory in their operation." (Answer, page 2) While the point is academic here, does this statement suggest that a 2(b) defense may be established only where a respondent's lower price is granted to meet a competitor's illegal price?

ment of an order to cease and desist. Complaint Counsel choose to ignore the fact that respondent has placed confidence in the Commission and in its Staff that within the stay period those "persons" charged with the responsibility for enforcing the antitrust laws will have taken whatever steps are necessary so as to avoid placing this respondent in the extreme competitive disadvantage of being the sole manufacturer under a final order to cease 853 and desist.

7. Respondent requested this Commission for a hearing for the purpose of furnishing further information on a confidential basis which would specifically show the injury respondent would suffer if it did not obtain the relief requested. (Petition, page 9.) Yet Complaint Counsel while *opposing* such a hearing concurrently *accuse* respondent of speculating but not demonstrating such losses. Implicitly at least Complaint Counsel concede that if such further losses could be demonstrated they might not oppose respondent's requested stay. This accusation of "speculation but not demonstration" graphically demonstrates the lack of any valid argument against respondent's request for the exercise of the Commission's discretion to stay entry of an order against respondent.

Therefore for the reasons stated in respondent's Petition it is respectfully requested that the relief asked be granted.

Respectfully submitted,

Frank C. McAleer,
James R. Fruchterman,
Attorneys for Respondent.

Kahn, Adsit & Arnstein,
120 South La Salle Street,
Chicago 3, Illinois,
Of Counsel.

August 4, 1964.

IN THE UNITED STATES COURT OF APPEALS,

For the Seventh Circuit.

Universal-Rundle Corporation, *Petitioner,* vs. Federal Trade Commission, *Respondent.*	No. 14763 F. T. C. Docket No. 8070

PETITION TO REVIEW AND SET ASIDE ORDER OF THE FEDERAL TRADE COMMISSION.

To: The Honorable Judges of the United States Court of Appeals for the Seventh Circuit.

Petitioner, Universal-Rundle Corporation, a corporation, respectfully presents this Petition for review of the Final Order and Opinion of the Federal Trade Commission issued on June 12, 1964, and served on Petitioner on June 26, 1964, and of the Commission's Order Denying a Stay of the Effective Date of the Final Order, issued on August 4, 1964 and served upon Petitioner on August 10, 1964.

Under the Commission's Final Order, Petitioner was ordered to cease and desist certain acts and practices allegedly in violation of the provisions of Section 2(a) of the Clayton Act, 15 U. S. C. § 13(a), as amended by the Robinson-Patman Act.

This petition is filed with this Court pursuant to Section 11 of the Clayton Act, 15 U. S. C., § 21. In support thereof Petitioner respectfully shows that:

I.

Jurisdiction and Venue.

Petitioner, Universal-Rundle Corporation, is a corporation organized and existing under the laws of the State of Deleware. It is engaged primarily in the production and sale of vitreous china and enamelled cast iron plumbing fixtures.

Respondent, the Federal Trade Commission, is a federal administrative agency created by Act of Congress.

Jurisdiction and venue are based upon the provisions of Section 11 of the Amended Clayton Act (15 U. S. C., § 21) permitting any person required by an order of the Federal Trade Commission to cease and desist to obtain judicial review by filing a written petition within the Circuit wherein such person resides or carries on business. Petitioner carries on business within this Circuit and maintains offices at 520 North Michigan Avenue, Chicago, Illinois, within the jurisdiction of this Circuit.

II.

The Nature of the Proceeding.

The Federal Trade Commission issued its complaint on August 4, 1960, charging that Petitioner had violated Section 2(a) of the Amended Clayton Act, 15 U. S. C. 13(a) by selling plumbing fixtures of like grade and quality in interstate commerce to purchasers under Petitioner's brand name "U-R" and to Sears, Roebuck and Co. under the Sears' brand name "Homart" at different net prices. The complaint alleged substantial injury to competition both in the primary and secondary lines. Petitioner's answer to the complaint denied the charges and set forth several affirmative defenses

tors' alleged truckload discounts must be unlawful if its own truckload discounts are unlawful is respondent's failure to demonstrate, or even to allege, that its competitors are also selling to accounts buying in truckloads and to competing accounts buying entirely in less-than-truckload lots.

843 The Commission noted recently in Callaway Mills, D. 7634, that mere comparison of discount rates establishes little or nothing. By the same token, the mere fact that respondent's competitors may be granting truckload discounts does not establish, nor does it necessarily suggest, that such truckload discounts as are granted are discriminatory by comparison to list prices paid by competing buyers who lack the capability of buying any part of their requirements in truckload quantities.

Although respondent pleaded that, if its prices were prima facie unlawful, they were nonetheless justified as good faith responses to competition permitted by Section 2(b) of the Act, no attempt was made to substantiate the plea. Considering the elaborate and expensive cost justification defense presented in respect of the products sold to Sears, we presume that no meeting competition defense was attempted because of counsel's judgment that any such defense would be unsuccessful. The Commission is now left to speculate upon the reason for respondent's abstention. The preceding discussion suggests that the reason may have been the simple fact that such competitive truckload discounts as are in existence are not discriminatory in their operation. Significantly, respondent carefully avoids conceding that its own truckload discounts are unlawful (Petition at 2, note 2) and similarly avoids characterizing the competitive discounts as unlawful, merely requesting the Commission to "correct the industry-wide practice . . . of granting discounts in prices on truckload shipments" (Petition at 2).

It is also noteworthy that the complaint in this proceeding issued in 1960, and, for the next four years, respondent carefully avoided furnishing assistance to the Commission to enable prompt investigation and remedial action to correct this alleged industry-wide practice. Now, after respondent's practices have been condemned as unlawful, respondent suddenly has discovered this industry-wide problem and has magnanimously offered to cooperate, provided the Commission accepts the most stringent terms of which we have ever heard for non-enforcement of an order to cease and desist issued against a proven law violator.

Respondent next speculates (but does not demonstrate) that it will suffer increased losses if forced to abandon its practice of granting truckload discounts while its competitors are not similarly restrained. We note that respondent has suffered substantial losses each year since 1961 while its competitors apparently enjoyed substantial profits. On its face, this information establishes that 844 respondent's principal competitive difficulties are unrelated to this Commission. In any event, the order issued against respondent does not prohibit truckload discounts but rather prohibits discrimination in price. If respondent is now contending that it should be permitted to continue discriminating in price, this Commission's prior decisions in *Moog Industries, C. E. Niehoff,* and *Mid-South Distributors* furnish the conclusive answer.

Moreover, as persons charged with some responsibility for enforcement of the anti-trust laws, we recoil from respondent's suggestion that the single method of pricing discussed in its petition is the only method of pricing capable of successful use. Respondent is free to meet competition in good faith as provided by Section 2(b). Respondent is free to grant lower prices whenever justified by lower costs. Respondent is even free to grant truck-

(1) truckload discounts on sales of plumbing fixtures were an industry-wide practice engaged in by each of Petitioner's six major competitors under the same circumstances disclosed by the instant record, (2) Petitioner's share of the plumbing fixture market in the sale of "U-R" brand fixtures, one of the smallest in the industry, was approximately 5%, while four manufacturers who were not under orders to cease and desist accounted for approximately 65% of that market, (3) Petitioner had incurred substantial operating losses in the operation of its business for the past three years, as contrasted to the extremely profitable operations of its competitors, and (4) a refusal to stay the effective date of the Final Order, while the Commission undertook to correct the industry-wide practice found to be unlawful in its Opinion, would result in further substantial financial losses to Petitioner, a substantial decrease in its volume of sales and in its share of the plumbing fixture market. Both the Petition and request for a hearing were denied by the Commission on August 4, 1964.

III.

Grounds for Relief.

The Petition to review and set aside the Commission's Final Order and the Order denying the Petition for Stay of the Effective Date of the Final Order is based upon the following grounds:

1. The Final Order and findings and conclusions contained in the Opinion of the Commission with respect to the existence of competition between Petitioner's purchasers are arbitrary, erroneous and contrary to law for among the following reasons:

(a) They are based upon inferences drawn from the record which are erroneous, both in fact and law;

(b) They are not supported by or based upon substantial evidence, and are directly contrary to the evidence contained in the entire record;

(c) They ignore the diverse functional or distributional levels at which purchasers paying different prices resold plumbing fixtures.

2. The Final Order and findings and conclusions contained in the Opinion of the Commission with respect to the effect upon competition of Petitioner's practice of granting truckload discounts are arbitrary, erroneous and contrary to law for among the following reasons:

(a) They are based upon inferences drawn from the record which are erroneous, both in fact and law;

(b) They are not supported by or based upon substantial evidence, and are contrary to the evidence contained in the entire record;

(c) They are based upon an erroneous interpretation of the purpose, intent and meaning of the "substantial" adverse effect upon competition requirement of Section 2(a) of the amended Clayton Act;

(d) They are based, in part, upon testimony of purchasers buying and reselling plumbing fixtures wholly in intrastate commerce.

3. The Final Order and findings and conclusions contained in the Opinion of the Commission with respect to the fact of price discrimination are arbitrary, erroneous and contrary to law for among the following reasons:

(a) They are not supported by substantial evidence in that the record fails to disclose a substantial number of instances wherein competing purchasers, contemporaneously or otherwise, paid substantially different prices for products of like grade and quality;

(b) They are based upon inferences drawn from the record which are erroneous both in fact and law.

4. The proscriptive provisions of the Final Order are improper for among the following reasons:

(a) They bear no reasonable relationship to the practice which was found to be unlawful.

(b) They are not restricted geographically to the one locality wherein a violation of the law was found to have existed, but are extended to all other areas wherein Petitioner may engage in business, on the unsupported assumption that Petitioner may have violated the law in such other areas.

(c) They are vague and ambiguous, do not clearly define the prohibited conduct, contain no definiton, specification, or otherwise indicate the nature of the proscribed conduct and therefore prohibit lawful conduct.

5. The Commission's refusal to grant a stay of the effective date of the Final Order or grant a hearing thereon is a patent abuse of the Commission's discretion, particularly in view of the showing made by Petitioner in support of its request and the lack of a finding in the Commission's denial Order that any possible adverse effect on competition might result from temporarily postponing the effective date of the Final Order.

IV.

Relief Prayed.

Wherefore, Petitioner prays that the aforesaid Final Order and Opinion of the Commission be set aside, and that the Commission be directed to dismiss its complaint against Petitioner, and for such other further and alternative relief as this Court may deem just.

Respectfully submitted,

Frank C. McAleer,
James R. Fruchterman,
120 South LaSalle Street,
Chicago 3, Illinois,
Attorneys for Petitioner, Universal-Rundle Corporation.

Kahn, Adsit & Arnstein,
120 South LaSalle Street,
Chicago 3, Illinois,
Central 6-3985.
Of Counsel.

Dated: August 21, 1964.

Before The Federal Trade Commission.

• • (Caption—8070) • •

Pre-Hearing Conference.

Room 600,
Federal Trade Commission,
Washington, D. C.,
Friday, 6 January 1961.

• • • • •

18 Mr. Depro: I would also, with respect to the time, say I am prepared for the year 1957, and that is just about the extent of it right now.

Hearing Examiner Buttle: This might interest you, gentlemen. Mr. Depro just pointed out the year 1957 is the year in point.

Mr. Depro: That you can rely on right now.

Hearing Examiner Buttle: So your preparation will involve that year?

Mr. Depro: As for your answer—

Mr. Medow: You are going to rely on prices—

Hearing Examiner Buttle: In the year 1957?

Mr. Medow: The year ending January 31, 1957?

Mr. Depro: In the calendar year 1957.

Mr. Weisbard: The year ending January 1958.

19 Mr. Depro: Yes. But we have a number of invoices in 1957.

Hearing Examiner Buttle: The calendar year ending December 31, 1957.

Mr. Medow: If I might say so, just that information will not be I think enough to identify, because those prices will vary within that year as I gather.

Mr. Depro: You can't tell whether you discriminated during 1957 or not?

Hearing Examiner Buttle: Just a minute. I am not going to require him to, as a matter of fact, indicate each and every price change. That it appears to me is asking for too much. I don't think even in the district courts you would get that much. That is requiring him to prove his case in the bill of particulars. Or certainly that segment of it.

I will not require that; no.

Mr. Weisbard: Will we get the cities involved though?

Mr. Depro: Yes.

Hearing Examiner Buttle: All I can say to you is I think I have made it quite clear as to what is required, and if you have a problem with it, move for further bill. That is the answer to it.

Mr. Depro: And the areas are the Philadelphia-Camden area, and also Cleveland, Detroit, Rochester, Buffalo, and Louisville.

I don't want to be restricted to these but this is for the basis of the complaint.

I would like to look into the Chicago area and also the Boston area. But that would require some subpenaes,

Hearing Examiner Buttle: Yes, I have indicated to you, Mr. Depro, I am going to limit your proof.

On the other hand, despite that fact, I am going to give the respondents a fair opportunity to prepare if they are surprised by additional areas, additional classes of products and additional prices.

Mr. Depro: I don't have any intent to surprise them.

Hearing Examiner Buttle: I don't see how I could limit your proof, because there is nothing in the rules with regard to bills of particulars, or the effect of bills of particulars on pleadings.

Mr. Weisbard: May I ask Mr. Depro a question?

You say you may go into those cities.

Would that also be during 1957?

Mr. Depro: No, I would want to look into 1958 and 1959—let's see—

Mr. Weisbard: If you go to Chicago and Boston, you would be talking in terms of 1958 and 1959.

21 Mr. Depro: Yes. Not necessarily the whole year for each one of those years, but I tentatively thought of six months of 1958 and six months of 1959.

The complaint was issued in—wait a minute. I have to change that—1959 and 1960.

Hearing Examiner Buttle: You will find that all of this will be no problem at all.

Mr. Depro: I would like to correct what I said about the dates. I intended to say 1959 and 1960, because I wanted to try to get it up to as close to the date of the issuance of the complaint, which is August 1960, as possible.

So instead of 1958 and 1959, I will change that to 1959 and 1960.

Mr. Medow: That is only for Chicago and Boston?

Mr. Depro: Yes.

Mr. Medow: Would you mind repeating the first cities?

Mr. Depro: Philadelphia-Camden—that is one area—Cleveland, Detroit, Rochester, Buffalo, and Louisville.

Mr. Weisbard: Those are the cities the Commission went into?

Mr. Depro: Yes.

Cincinnati was also one but I have not included

22 that.

Mr. Weisbard: This being consolidated proceedings, am I correct in assuming that unless you distinguish, the remarks you make now reply both to the charge that Universal has discriminated in favor of Sears, as well as the charge Universal has discriminated to its other customers?

Mr. Depro: I think so. But on the question of con-

solidating, I feel a lot of times it is very difficult to do that and keep from being confusing.

28 Hearing Examiner Buttle: When I refer to classes of products, insofar as a bill of particulars is concerned, I am attempting to require that you be given enough information so that you can go to your files, with facility, and find whatever evidence you need relevant to the issues in the case which will help you defend and set up your defense, to cross-examine and make such motions as may be appropriate. That is the purpose of it. The purpose of it is not to limit proof. I don't feel that I can issue a bill of particulars which would limit the proof, because there is no provision for it. I don't know as I agree with the fact that there is not, but nevertheless, there is not.

Mr. Weisbard: It is not so much from the standpoint of limiting the proof, I think it is from the standpoint of giving us sufficient information to prepare a defense.

Hearing Examiner Buttle: You will have sufficient information when these requirements are met, plus the fact I have indicated to you already that I am going to issue an order requiring that the listing of documents be

29 given to you and you will be given reasonable notice as to those documents which will be offered in evidence and as to the testimony which will be offered, and in addition to that, you will be informed of the purpose of the documents and of the testimony in accordance with the theory of the Commission's case.

You will have to do the same thing, also.

Mr. Depro: I would like to refer again to the Fruitvale case, Mr. Examiner, that it seems to me this case does not set forth the Commission's policies with respect to these pleadings, and this paper, and where they say the function is to assist the moving party to plead, not to aid him generally in the trial, it seems to me that

certainly we are going pretty far today beyond what I believe the Commission would require as a minimum.

Hearing Examiner Buttle: Well, I think what they require as a minimum is exactly what I have indicated and which I read previously.

In other words, to eliminate undue burden in preparation of a defense. That is the only purpose that a bill of particulars can possibly have. It certainly cannot be for the purpose of limiting proof.

Don't you agree with that?

Mr. Depro: Well, it certainly cannot be used for the limiting of proof, in a Commission case. I would agree with that. As to whether it is necessary to permit them to prepare for a defense, it seems to me there has never been any occasion I know of where respondent has been denied an opportunity to prepare a defense in these cases.

Hearing Examiner Buttle: That is perfectly true. And, as a matter of fact, the Commission does point out, of course, that you always do have ample time to prepare after the Commission presents its case. That is perfectly true.

On the other hand, it does not make sense to have the Commission present its case and then have a long delay while counsel for the respondent is preparing for the case, if they can be prepared at the very inception. Not only that, but it is not as simple as it would appear to be, because in order for counsel for the respondent to be prepared they must be prepared for cross-examination. And they must be prepared to make objections and motions, and we are certainly not going to stop the proceedings every time we have a little surprise here and there and if we do not then there is a question as to whether or not the respondents have been prejudiced.

The language I have read seems to indicate just that. I mean to point out in citing the National Labor Relations

Board case, versus Remington Rand, the court made
31 it clear why bills of particulars are necessary in administrative proceedings.

In fact, this opinion was written by Learned Hand, saying:

> "The Examiner did deny a bill of particulars but that could not have seriously prejudiced the respondent. Such a bill is important only when a party must meet his adversary's case, without opportunity to prepare. It is of slight value in a trial by hearings at intervals. The motion that its absence really handicapped the respondent in the cross-examination seems to us to be illusory"—that depends on the particular situation.

On the other hand, as I read before, nevertheless the Federal Trade Commission itself ruled that bills of particulars are to be ordered where furnishing the information requested will avoid placing an undue burden on the respondent, in the matter of United States Steel Corporation, Docket 6078, Pike and Fisher Ad.L. 2d 618 (1954), the Commission reversed the hearing examiner's denial of the bill of particulars.

The Commission ordered counsel supporting the complaint to identify items among representative product types. This is the exact language I will be using, incidentally, which he was going to contend were desig-
32 nated as standard for pricing purposes.

> "The Commission so acted because the failure to identify the items more particularly needlessly might place an undue burden on the respondent incident to investigation in preparing their defense as to this aspect of the proceeding. In addition, the Commission in this case also required counsel supporting the complaint to furnish information as to the period of time to be covered by the evidence."

• • • • • •

No violation of law was found in connection with the sale of plumbing fixtures by Petitioner under the "Homart" brand to Sears, Roebuck and Co., as the Commission ruled that the "Homart" plumbing fixtures were not of like grade and quality with plumbing fixtures sold by Petitioner under its "U-R" brand name. No injury to competition on the primary or seller level was found by the Commission.

The only finding of violation was in connection with the sale by Petitioner of plumbing fixtures distributed under its "U-R" brand name to purchasers at different prices affecting competition on the secondary or buyer level. This finding and the order to cease and desist based thereon is the only issue involved in this proceeding.

Trial commenced on October 15, 1962, at Philadelphia, Pennsylvania. The evidence in support of the Commission's finding of violation was limited to the sale of plumbing fixtures by Petitioner under its "U-R" brand name to purchasers located in the cities of Camden, New Jersey and Philadelphia, Pennsylvania.

At the trial Petitioner's invoices for the year 1957 for five of its purchasers located in Philadelphia and five of such purchasers located in Camden, New Jersey, were introduced. Representatives of seven of these purchasers—four from Philadelphia and three from Camden—were called by the Commission to support the charges alleged in the complaint.

Immediately folowing the Commission case, Petitioner presented its defense evidence. No further evidenciary hearings were held after November 1962, and the record was formally closed by the Hearing Examiner on July 29, 1963.

On October 28, 1963, the Hearing Examiner filed an Initial Decision in which it was held that the only illegal lower prices were discounts granted by Petitioner on truck-

load shipments to purchasers of "U-R" branded plumbing fixtures during the year 1957. The following order to cease and desist was entered:

> "Ordered that respondent Universal-Rundle Corporation, a corporation, and its officers, directors, agents, representatives and employees, either directly, or through any corporate or other device, in connection with the sale of plumbing fixtures in commerce, as 'commerce's defined by the Clayton Act, do forthwith cease and desist from:
>
> Discriminating in price by selling 'Universal-Rundle' brand or Universal-Rundle manufactured plumbing fixtures (exclusive of the 'Homart' brand sol dto Sears, Roebuck & Co.) of like grade and quality to any purchaser at prices higher than those granted any other purchaser, where such other purchaser competes in fact with the unfavored purchaser in the resale or distribution of such products."

Petitioner appealed the Examiner's Initial Decision and Order relating to its sales of "U-R" brand fixtures to the Commission. On April 15, 1964, Oral Argument was heard by the Commission. On June 12, 1964, the Commission entered its Final Order and Opinion.

The Commission modified certain of the findings and conclusions in the Initial Decision, and also ruled that the Hearing Examiner had erred in finding that sales made by Petitioner to its Camden purchasers were sales in interstate commerce. The Commission adopted the order to cease and desist contained in the Initial Decision and denied all other aspects of Petitioner's appeal.

On July 20, 1964 Petitioner filed a Petition with the Commission for a temporary stay of the effective date of the Commission's Final Order and requested a hearing before the Commission. The requested stay and hearing thereon were predicated upon a showing by Petitioner that

Mr. Depro: Well, I would like to—may I be seated?

Hearing Examiner Buttle: Yes, you can be seated.

Mr. Depro: That is our intention, Mr. Examiner, to use the Philadelphia-Camden area as the basis for it but there is a possibility, and I think we discussed this at the conference last week, that there might be some testimony that we would want to take from someone in the Detroit area and also from some others whom we might bring into Philadelphia but are not in Philadelphia.

Hearing Examiner Buttle: That's testimony from the Detroit area. But what I am interested in is a definition of what trade areas we are talking about first and you can bring witnesses from other areas if you want to into the Philadelphia area. The respondent is entitled to know on what trade areas you are going to premise your case. Now, what trade areas are they?

Mr. Depro: Here is what I don't want to do. I want to rely primarily, certainly, on the Philadelphia area but I don't want to foreclose any possibility of another area should I feel that we ought to go into that and I would like to have some provision whereby I could give the respondent adequate notice of another area in the event that we feel we ought to include that also.

Hearing Examiner Buttle: Aren't you in a position
8 now to select those areas? Of course, I realize the Bill of Particulars in the Federal Trade Commission is a different thing than it is in the courts and granted for different reasons. It is not granted for the purpose of limiting the pleadings but on the other hand, it is premised upon convenience of counsel for the respondent in preparing their defense and time can be saved if counsel for the respondent now know what trade areas they have to deal with.

Now, if you wish to include other areas and you are in doubt about them, it doesn't mean you are obligated to

produce evidence with regard to those areas but on the other hand, I think you should indicate now what areas you do have in mind.

Mr. Depro: I would have one other area, at least, in mind and that is the Detroit area.

Hearing Examiner Buttle: In other words, it is the Philadelphia and Detroit area?

Mr. Depro: Yes, and we did give some prices in the Bill of Particulars for the Detroit area.

Hearing Examiner Buttle: Then the case is confined to the Philadelphia and the Detroit areas—by Philadelphia area, I mean Philadelphia-Camden area—and the Detroit area.

Is that satisfactory to you?

Mr. Depro: And then there is one more. I don't know whether this might be included in the Philadelphia area or not but it would be in the Altoona, Pennsylvania
9 area. I don't know whether that is a separate area itself or whether it can be included.

Hearing Examiner Buttle: I have heard of Alfoona but I am not sure where it is.

Mr. Weisbard: It is in the middle of Pennsylvania. He can go where he wants.

Hearing Examiner Buttle: Of course. I suppose, dependent upon the nature of the business, areas may be smaller or larger. How far is Altoona from Philadelphia?

Mr. Depro: 250 miles, I think, 200 or 250 miles from Philadelphia.

Hearing Examiner Buttle: Of course, that wouldn't normally be considered a Philadelphia area, certainly not the same trade area. So what you are talking about is three areas, one is the Philadelphia-Camden area, the other is the Altoona area and with regard to the Altoona area, I assume you will bring those witnesses into Philadelphia in any event—

Mr. Depro: (Interposing.) Yes, sir.

Hearing Examiner Buttle: And the Detroit area, and you have confined yourself to those three areas so far as your Bill is concerned?

Mr. Depro: I think we can.

Hearing Examiner Buttle: It doesn't mean you can't bring witnesses from other places if they are going to testify as to evidence regarding those areas, obviously.

Those are the three areas to which you intend to confine your proof; is that right?

Mr. Depro: Yes, sir.

Hearing Examiner Buttle: All right, so much for that.

Mr. Weisbard: May we comment on that?

Hearing Examiner Buttle: Certainly you may.

Mr. Weisbard: I will take the matters in order here. On the question of 1957, we for respondent, Sears, were not represented at the informal conference.

Hearing Examiner Buttle: By the way, when you are speaking of those three areas, you are speaking about the Universal-Rundle case and the Sears case or just the Universal-Rundle case?

Mr. Depro: Well, I was thinking about the Universal-Rundle case.

Hearing Examiner Buttle: All right.

Mr. Weisbard: Just for the clarification of the record, your Honor, the Universal-Rundle case includes charges of both discrimination in sales to Sears as against to sales to Universal-Rundle customers other than Sears, as well as charges for discrimination to other customers than Sears themselves and is Mr. Depro saying that only the latter aspect will go to Altoona or are you going to take both counts in all three cities?

I call them "counts," I don't know what they are.

Mr. Depro: Both phases of it. I think we intend to do both phases in each area. I don't know how much of it there is in the Altoona area but there is at least one phase.

Mr. Weisbard: On the question of 1957, Universal-Rundle agreed informally with Commission counsel last week that if they select pricing in 1957 and prove their alleged discrimination in 1957 that Universal-Rundle would not raise the defense that those prices are moot or that the prices changed and that would be all right.

On the question of the Philadelphia-Camden area or limiting it to Philadelphia-Camden, to Detroit and possibly Altoona, that on the record stands. I would not like it to appear however that it is a stipulation. We don't stipulate as to what the Commission wants to do to limit its proof. If they feel they can make a case there, go ahead and do it and we will meet it.

Hearing Examiner Buttle: With this limitation, the difference in a Bill of Particulars or in specifying particulars or orally amending the Bill of Particulars which has been done in this case, it is not for the purpose of limiting proof as it would be in a matter in District Court or normally in a State Court. But it is for the purpose of apprising the respondent so that he may more adequately prepare and more conveniently prepare a defense.

That has been the reason given by the Commission for a Bill of Particulars although they have no rules relating to Bills of Particulars as such.

Mr. Weisbard: I understand that, sir. That wasn't the reason for my comment.

Hearing Examiner Buttle: You used the word, "limit."

Mr. Weisbard: I mean if they choose voluntarily. I understand they can go to any city they want.

Hearing Examiner Buttle: They can't do that either. If they go to another city, they have to give you a reasonable time.

Mr. Weisbard: I understand that but the point I want to make is, there is no stipulation or agreement that the

cities they just mentioned, these three area, are in any respect representative, typical, or anything else. That is their proof and their choice.

Hearing Examiner Buttle: In that respect, the disposition is no different than it would be if he hadn't filed a formal Bill of Particulars which is the normal practice in the courts. There is no stipulation that those particular areas must be applicable. It is simply an indication on his part as to the limitations upon his proof that he intends to impose on himself now.

13 Mr. Weisbard: When he finishes his case he will have decided where he wants to go without our participating in that decision in any way.

Hearing Examiner Buttle: If your defense involves another area, you are free to go to another area.

Mr. Weisbard: Another thing—I think Mr. Depro commented—

Hearing Examiner Buttle: (Interposing.) Your position is a valid one in desiring to go to another area.

Mr. Weisbard: I have no objection to that. I just want to be a party to the choice.

Hearing Examiner Buttle: You are not a party to the choice.

Mr. Weisbard: As Mr. Depro noticed, the Bill of Particulars I filed, I think, around the end of February or March, did not set forth any products or prices representative or complete in the Philadelphia-Camden areas and Altoona was never mentioned either as to price or product or even that they intended ever to go into it. Now, I say this although I—

Hearing Examiner Buttle: (Interposing.) Was Detroit?

Mr. Weisbard: Detroit was and we had representative products at that time.

Hearing Examiner Buttle: Let's dispose of that. One thing at a time, Mr. Weisbard. Will you be able to

indicate for the Altoona area the same thing that you have indicated for the Detroit and Philadelphia-Camden area as far as prices are concerned?

Mr. Weisbard: He hasn't done it for the Philadelphia-Camden either.

Hearing Examiner Buttle: Oh, he has not?

Mr. Weisbard: No. At our last Pre-Hearing Conference, he said he might go into Philadelphia and in the Bill, at the end of the Bill, he said he might go into Philadelphia. He didn't give any examples of products so we had no discovery in any way even to apprise us of the advances he was going to explore generally in Philadelphia. delphia.

Hearing Examiner Buttle: Well, I believe you should mention the general line of products and the areas.

Have you done that?

Mr. Depro: Sir?

Hearing Examiner Buttle: Have you done that?

* * * * *

Mr. Depro: (Continuing.) —I mentioned there at the bottom of 19 and top of 20 that the areas were the Philadelphia-Camden area and then I mentioned five other areas including Detroit. I also mentioned several others that I considered we might possibly go into but we did not have the prices from Sears in the Philadelphia area at the time that I made up this Bill of Particulars that I gave so as to compare the prices to the trade with the prices to Sears and yet the Philadelphia area does have the largest number, I think, about 55 or 56 accounts of Universal-Rundle which is one of the largest areas from the number of accounts point of view of any in the country.

Hearing Examiner Buttle: Well, has there been full compliance with my Order of January 24, 1961 in so far as each and every area is concerned?

Mr. Weisbard: I hesitate to say there has not because it might have been if they hadn't decided to go in Philadelphia and Altoona. A few weeks ago, they decided they wanted prices in Philadelphia and one of the subjects of our meeting on Friday of last week was to agree with them that they could send a man into Universal-Rundle's home office and examine the invoices to Sears-Roebuck.

I presume that after those invoices are made available, they will then complete the Bill of Particulars in the form they furnished it for Philadelphia and Camden and Altoona.

Hearing Examiner Buttle: Well, it is my direction that the Bill of Particulars pursuant to the new Order that I issued January 24, 1961 should be provided to the respondents and of course filed, with regard to the Altoona area, the Philadelphia-Camden area, and the Detroit area within 10 days after this Pre-Hearing Conference. Is that reasonable or is it unreasonable?

Mr. Depro: May Mr. Lipnick speak?

Hearing Examiner Buttle: All right.

Mr. Lipnick: With respect to both the Philadelphia and the Altoona areas, we can state now that the specific products that we are primarily interested in are the same products that are listed in the Bill of Particulars.

Hearing Examiner Buttle: Identically the same products?

Mr. Lipnick: May I say very substantially the same, virtually identically the same.

Hearing Examiner Buttle: That's all that can be expected of you.

Mr. Lipnick: It is our feeling at this point if we can prove our case in that area, we can do it with these products.

Hearing Examiner Buttle: So you say your Bill of Particulars is applicable to each and every one, the ones you named, Detroit, Altoona and Philadelphia?

Mr. Lipnick: As far as the specific products, as far as the items by catalog number are listed.

Now, as far as the Philadelphia area is concerned on the discriminations with the competing purchasers of
17 the Universal-Rundle products, we are in the process now of making a tabulation of this and I think within 10 days, we can furnish representative items.

Hearing Examiner Buttle: All right, within 10 days.

Mr. Weisbard: One other point, to get back, in which I don't think your Order of January 24, 1961 was fully complied with in the written Bill. I did have a conference with Mr. Depro on the telephone about it and he can correct me if I am wrong about it. I called him shortly after I received the Bill and I commented that it seemed only partially satisfactory because all he did was compare representative products at prices on the one hand to Sears and on the other hand to trade customers generally, but he did not give any examples of any kind as to prices among Universal-Rundle's customers. That is the second phase of the case.

I said, am I to presume they are going to be the same products and whenever there is a price range as distinguished from a single price shown on the UR trade line those are the ones he is going to use. I believe he said, yes.

Now, I'd like that clarified.

Hearing Examiner Buttle: Is the answer, yes?

Mr. Lipnick: I don't know if we will use these specific ranges. It will be on these products and within 10 days we will furnish counsel for the respondent with a list of at least substantially representative pricing situations
18 giving comparative prices for each product.

Mr. Weisbard: Will that include Detroit?

Hearing Examiner Buttle: Will that include each of the areas?

Mr. Weisbard: We never had it in Detroit.

Mr. Lipnick: This is the trade against trade discrimination in Philadelphia we are preparing now.

I would like to go back for a moment, if I may, your Honor, with respect to Universal-Rundle sales to Sears as compared to their sales to purchasers of Universal-Rundle products in the Philadelphia-Camden area and in the Altoona area, we just Friday made arrangements with counsel for the respondent to have access to the Universal-Rundle files of their sales to Sears in those areas so I don't think that we could possibly give them the information within 10 days.

Hearing Examiner Buttle: How soon can you give it to them?

Mr. Lipnick: It will depend on how soon we can arrange to hav our accountant go up to New Castle.

Hearing Examiner Buttle: When will that be?

Mr. Lipnick: We don't know when they will be made available to our accountant.

Mr. Weisbard: As soon as we are asked.

Mr. Depro: Immediately?

Mr. Weisbard: Tell me what day now and we will let you know.

Hearing Examiner Buttle: All right. I am going to add four more days to it. Shouldn't we be able to accomplish that within two weeks?

Mr. Depro: Could I ask how many illustrations do we have to give, Mr. Examiner? Is it one example or how many would be satisfactory to meet the requirements of your Order?

Hearing Examiner Buttle: Well,—

Mr. Weisbard: (Interposing) I think on Sears, Mr. Examiner, they won't have too much trouble. The prices do not change as quickly with Sears as they do with the trade. The trade fluctuates quite frequently. Sears, because it is a catalog house, has fairly stable prices. It may change

three or four time in the year. I don't want to get any red herrings if you give us—

Hearing Examiner Buttle: (Interposing) What you would do is get together and ascertain what would be representative.

What would your thoughts be in that respect?

Mr. Lipnick: Your Honor, your Order is not to be construed as requiring us to give every instance of discrimination?

Hearing Examiner Buttle: No, not every instance of discrimination but a sufficient number of typical instances to be representative.

Off the record.

(Discussion off the record.)

Hearing Examiner Buttle: On the record.

Mr. Weisbard: Are we going to be furnished with the invoices and other documents the Commission proposes to introduce in advance?

Hearing Examiner Buttle: Let's cross one bridge at a time.

Mr. Weisbard: Let me cover this point but we can discuss it again when we get to that phase.

Hearing Examiner Buttle: What we are talking about now is the Bill of Particulars. Let's dispose of the Bill of Particulars and then we will go on to that point.

All right. In so far as the Bill of Particulars is concerned, I suggest that what you do is indicate a sufficient number of instances that you consider representative and as a matter of fact, if possible obtain the agreement of counsel to the respondents they are representative. Of course, that would be helpful if that could be obtained.

Mr. Weisbard: I don't see how we can possibly do that. It depends on what they are going to try to prove. It may be representative of our pricing to a customer here at one time, —

1 BEFORE THE FEDERAL TRADE COMMISSION.
* * (Caption—8070) * *

Pre-hearing Conference.

Room 332
Federal Trade Commission Building,
Washington, D. C.
Wednesday, October 4, 1961.

Met, pursuant to notice, at 10:20 a.m.

* * * * * *

4 Mr. Depro: Mr. Examiner, in our investigation files there has been a study made of prices of various products of Universal-Rundle Company sold to trade customers and to Sears for the year 1957 and we have, I believe
5 it has been a point of agreement, Mr. Weisbard can confirm this, that we have agreed that the year 1957 would be the year that we would take and that they would not raise any question of mootness or discontinuance if we confine our case to that year.

Hearing Examiner Buttle: Well, do you?

Mr. Depro: We have agreed we would do that if their feeling is the same with respect to mootness or discontinuance.

Hearing Examiner Buttle: In other words, I may assume that the Complaint contemplates that year?

Mr. Depro: The Complaint does, yes, and the Bill of Particulars did mention 1957. There is some question about the Bill of Particulars. I think perhaps I would let Mr. Weisbard speak on that but we would like to confine this case to the question of injury and discrimination and to the Philadelphia-Camden area because of, one reason being that there seems to be a larger number of jobbers or wholesalers of Universal-Rundle products in that area

and there are also a representative number, I believe, of Sears stores in that trading area.

Hearing Examiner Buttle: Well, if that is the case we can confine the hearings to Philadelphia. That would make it rather convenient.

Mr. Depro: We could certainly do that although we did not mention that in the Bill of Particulars and did
6 not set up any alleged discriminations for the Philadelphia-Camden area. But we did mention the fact in the last Pre-Hearing Conference that among the areas I think the Philadelphia area was the first one that was mentioned, Philadelphia-Camden area, but we certainly had no intention—

Hearing Examiner Buttle: (Interposing.) Now, you are stating on the record that you intend to confine your case to the Philadelphia area and you wish to amend your Bill of Particulars to that extent; is that it?

Mr. Depro: Well, as far as I can recall, we don't have any illustrations of discriminatory prices set forth in the Bill of Particulars for the Philadelphia-Camden area but we did mention that in the course of the Pre-Hearing Conference that that was one of the areas we would take but we did not take any Sears prices as far as I know at that time for shipments into the Philadelphia area.

Hearing Examiner Buttle: What I am getting at, let's confine the hearing of the case, the trial of the case, to an area where you can adduce all of the proof that you think you will be required to adduce if it can be done without moving from city to city and of course, what I am interested in now is having you indicate if you wish to amend your Bill of Particulars and indicate the area to which you intend to confine your case regardless of what kind of proof this involves.

Is that the Philadelphia area, Philadelphia and Cam-
7 den area?

Hearing Examiner Buttle: (Interposing) In other words, you don't wish to take that position?

Mr. Weisbard: I can't say we can or can't, your Honor, until I speak to them about it.

Hearing Examiner Buttle: Then my direction is that you proceed on the basis of indicating the number you consider to be representative and then the respondent will not be in the position of incurring the view it is representative. I can't force them to do that. They apparently do not wish to concede what is representative and I can see the reason for that.

Mr. Weisbard: May I ask them that as far as areas other than Philadelphia-Camden and Altoona to which you say there may be a little more delay, that my understanding as to the aspects of the case, trade against trade in the

from a single price to the trade. Is that correct?

Mr. Depro: Maybe I don't understand exactly what you mean about the range.

Mr. Weisbard: When we got a Bill of Particulars, the Bill purported to list a number of products and what you alleged are comparable products to Sears on the one hand and to the trade on the other. You gave prices to Sears during the year and price or prices to the trade. In some instances, the trade price was only a single price. I assume there couldn't be any discrimination in trade,
22 customers against customers.

My understanding, in places where there was a range, those are the products you are going to use trade against trade and it would be prices within that differential.

Mr. Depro: I assume that is it. I take it those prices we have are the high and low for that period among your trade customers.

Mr. Weisbard: It wasn't clear.

Mr. Depro: If there were different prices, we don't know about it.

* * * * *

33 Hearing Examiner Buttle: Now, what about the documents? Had you contemplated giving them copies of documents? How many are there, by the way?

Mr. Depro: We have got to get access to their files, Mr. Examiner.

Hearing Examiner Buttle: You don't have any?

Mr. Depro: We don't at this time.

Hearing Examiner Buttle: I would assume it would be unnecessary to give them documents that come from their files.

Mr. Depro: What we are doing is relying primarily

proof. I am not trying to get at that but there seems to be a great big secret all the time about what the Commission is trying to prove here. I don't see the purpose served. I think, for example, back in '58—

Hearing Examiner Buttle: (Interposing) we are talking about documents now. The primary thing I am interested in is whether or not you will desire copies of documents they take from your files and that doesn't seem like much sense to me.

Mr. Weisbard: I can explain why.

Hearing Examiner Buttle: If there is, tell me about it.

Mr. Weisbard: Back in '58, your Honor, we opened, I guess, hundreds and hundreds, maybe thousands of files to them. At that time the investigation covered a broader scope of statutory provisions than it does now but there were many hundreds and hundreds of invoices that they had available to them.

I told them at that time it would be helpful to know which invoices they wanted to use. Well, they didn't want to let us know. We've got, I don't know how many thousands of invoices we have in these cities. It is impossible for me to know unless we know which one they are selecting. It is pretty difficult to know.

We have what we call, representative—

Hearing Examiner Buttle: (Interposing) Just a minute. They are going to tell you what ones they are selecting but of course they are going to identify them by an identification number and I don't suppose—

Mr. Weisbard: (Interposing) That's all right if we get that.

* * * * *

Hearing Examiner Buttle: When you were referring to 1957, you are talking about a fiscal or calendar year?

Mr. Depro: We were talking about a calendar year.

Hearing Examiner Buttle: They state their records are kept on a fiscal basis.

Mr. Weisbard: Our fiscal year begins February 1 and goes to the following January 31. I assume you are going to take February 1 and go to January 31. Our compilations and totals of sales are on that basis.

Hearing Examiner Buttle: I think that would be very helpful.

Mr. Depro: I think that we would include one month of '58 and one of '57.

Mr. Lipnick: We have a little problem with that but I think we can work it out with counsel for the respondent. Off the record?

Hearing Examiner Buttle: What is the problem?

Mr. Lipnick: The problem involves the sales trade against trade discrimination. The information in that respect we have to date was taken on a calendar year basis. So—

Hearing Examiner Buttle: You only have an adjustment of one month.

Mr. McAleer: All that is involved is January of
45 '57, only a month at the beginning of the year.

Hearing Examiner Buttle: You only have an adjustment of one month.

Mr. Lipnick: This is January, '58. This becomes additional information we need from your file.

Mr. Weibard: You are welcome to ask for what you want.

Mr. McAleer: Just as long as we have it clearly understood 1957 would be based upon the fiscal year, the year being February 1, 1957 to January 31, 1958.

Hearing Examiner Buttle: I think that would be reasonable because then there will be some correlation in so far as the proof is concerned with regard to the fiscal activities of the company which is important to you. So we will assume by 1957, what you are referring to is the fiscal year commencing February 1, 1957 and ending January 31, 1958. All right.

* * * * *

46 Hearing Examiner Buttle: (Interposing) What do you intend to show?

* * * * *

47 Mr. Depro: In addition to that, we propose to show anyhow that among the trade customers of the Universal-Rundle that there has been discrimination in price practice between these customers, the margin of the differential we propose to show from the evidence of these people in the trade, testimony of these people in the trade, is that of a substantial nature and some injury can be inferred as a result. I don't know what else we can say on that.

Hearing Examiner Buttle: Of course, as I indicated before, the thing that is going to be the most helpful thing is the allocation of the evidence in accordance with the Order I have issued.

Do you wish to make a statement?

Mr. Weisbard: We are going to attempt to refute the Commission's charges that the products involved, the Homart line and Universal-Rundle line are like grade and quality. I don't think there would be any dispute of the price of the company if we are going to refute any possible adverse effect on competition both as between Sears and the trade and as among trade customers themselves and in many instances, show that there is a question of meeting
48 competition in different lines of commerce involved therein and there may be some question of Interstate Commerce which I can't state now until I know what they are going to put in.

* * * * *

1 BEFORE THE FEDERAL TRADE COMMISSION.

(Caption—8070)

Room 300 U. S. Customs and Appraisers Stores Building, 2nd & Chestnut Street, Philadelphia, Pennsylvania, October 15, 1962.

Met, pursuant to notice, at 10:15 a.m.

2 PROCEEDINGS.

Hearing Examiner Buttle: The hearing will come to order.

Let the record show that we have convened in the matter of Universal-Rundle Corporation, Docket No. 8070, on October 15, 1962, in Room 300 of the United States Customs House, Philadelphia, Pennsylvania.

3 Hearing Examiner Buttle: All right. This isn't exactly what I meant. All right. Any statement that either counsel wishes to make before we call the witnesses?

Mr. Depro: I could make a statement, Mr. Examiner.

Hearing Examiner Buttle: All right.

Mr. Depro: We propose to prove here in this case against Universal-Rundle that they have discriminated in price in the sale of certain bathroom fixtures to the trade customers and also to Sears and of the products sold to Sears under the Homart brand are of like grade and quality with the products that the respondent sells under its trade name, Universal-Rundle.

We propose to show that there are discriminations as between trade customers and also between the trade customers and Sears in price. And we have selected the

Philadelphia-Camden area, as you know, as the area in which we propose to show these discriminations, and the year 1957 has been selected, and I understand that the respondents will not raise any questions of mootness because of that selection.

Also in addition to the bathroom fixtures, also kitchen sinks are among the products that we propose to show
4 discriminations on.

Hearing Examiner Buttle: Does counsel for the respondents have anything to say?

Mr. McAleer: No, Mr. Buttle. We will waive opening statement.

Hearing Examiner Buttle: All right. Counsel for the Commission may proceed.

Mr. Depro: I would like to call Mr. Backner.

STANLEY S. BACKNER was thereupon called as a witness for the Commission, and having been first duly sworn, testified as follows:

Hearing Examiner Buttle: Please be seated and give your name and address to the Reporter, that is, your residence address.

The Witness: Stanley S. Backner, 28 East Maitland Lane, New Castle, Pennsylvania.

Hearing Examiner Buttle: What is your business address?

The Witness: Universal-Rundle Corporation, New Castle, Pennsylvania.

Direct Examination.

By Mr. Depro:

Q. Mr. Backner, what is your position with the Universal-Rundle Corporation?

5 A. Vice President in charge of marketing.

Q. And how long have you been Vice President in charge of marketing?

A. Thirteen years.

Q. How long have you been with the corporation?

A. Forty-two years. The corporation and its preceding companies.

Q. I see. And what was your position before you became Vice President in charge of marketing?

A. I was Vice President of the Universal Sanitary Manufacturing Company, which was one of the predecessor companies of the Universal-Rundle Company.

Q. Universal Sanitary—

A. Manufacturing Company.

Q. And what was the business of Universal Sanitary?

A. Manufacturing vitreous china plumbing fixtures.

Q. And what is the business of Universal-Rundle?

A. Manufacturing vitreous plumbing fixtures. Except now they manufacture cast iron plumbing fixtures as well as vitreous china.

Q. I see. And where is the principal place of business?

A. New Castle, Pennsylvania.

Q. Now, does the Universal-Rundle Company do a nationwide business?

A. Yes.

6 Q. Was that so in 1957?

A. Yes.

Q. And where are the sales offices? How many sales offices do you maintain?

A. We have seven sales offices.

Q. Seven sales offices?

A. Yes.

Q. How many did you have in 1957?

A. Same number.

Q. And do you have warehouses all over the—

A. We have two warehouses outside of New Castle.

Q. And—

A. That is, warehouses outside of the plants. One is in Boston and the other is in Los Angeles.

* * * * *

Q. Now, what would have been your duties in connection with the position as Vice President in charge of marketing?

A. I have several departments reporting to me which I direct—the sales department, advertising, sales promotion, new product development.

Q. Would these same duties have been carried out by you in 1957?

7 A. Yes.

Q. You are familiar with the sales methods and practices of the Universal-Rundle Company?

A. Yes.

Q. Now, could you tell us what the sales methods of Universal-Rundle are or were in 1957?

A. I don't quite understand what you mean by sales methods.

Q. I mean to whom do you sell? How do you—

A. We sell our products generally to wholesalers of plumbing and heating supplies.

Hearing Examiner Buttle: How long have you been doing that?

The Witness: Ever since the company existed, sir.

Hearing Examiner Buttle: Until the present.

The Witness: Until the present. And we also sell Sears, Roebuck & Company.

By Mr. Depro:

Q. Are they the only two classes of customers, rather, the wholesalers and Sears?

A. Generally speaking yes. The classification of wholesalers isn't very exact. Certain types of customers call

themselves wholesalers. They might not quite be wholesalers. Or they may mix some retail business with their wholesaling operation, but they are classified as wholesalers.

Q. When they mix retail business with their wholesaling, did you sell them as wholesalers in 1957?

8

A. That is right.

Q. Did you make any attempt to determine the functions as to whether or not there was a predominance of one or the other, either wholesaler or—

A. The customers we had in 1957 were predominantly wholesalers. That is, the predominant part of the business was wholesaling.

Hearing Examiner Buttle: What do you consider a predominant proportion of the business?

The Witness: As a matter of fact, sir—

Hearing Examiner Buttle: The use of the word "predominance" confuses me as a characterization.

The Witness: I see.

Hearing Examiner Buttle: If there had been an objection, I would have sustained the objection, but I must know what you mean by it.

The Witness: I would say certain customers do a small percentage of retail business but the larger percentage of the business is done in a wholesale way. In other words, there are very few wholesalers that don't at some time or other sell to the public. If a consumer walks into a place of business and wants to buy a fixture, quite often a majority of our customers will sell them.

Hearing Examiner Buttle: Well, when you are talking about that kind of a customer, are you talking about a column buying retailer?

9

The Witness: No, sir. I am talking about a business that is primarily wholesale but may do some retail business.

By Mr. Depro:

Q. Mr. Backner, when I used the term "predominant", I meant a majority, at least a majority.

A. Of the people we sell?

Q. Of the business was wholesale.

A. That is right. In every case the majority of their business is wholesale.

Q. Now—

Hearing Examiner Buttle: In other words, they do a substantial business retail and they do a substantial business wholesale. Is that it?

Mr. McAleer: I think, Mr. Buttle—

Hearing Examiner Buttle: I am confused. To say it is a majority means nothing to me.

Mr. McAleer: I think if Mr. Depro could be a little more specific in his question—

Mr. Lipnick: Mr. Examiner, if I may, we have, as you know, a number of Universal-Rundel's wholesaler customers in this area under subpoena, and I think when they appear they will describe their operations, as I anticipate this, they will state that perhaps five to ten per cent of their total gross volume is derived from retail operations with the balance being derived from wholesaling.

Hearing Examiner Buttle: You see, what bothers me is when you start using the word "majority", when you ask questions and when I hear the answer, I take in every word and, as a matter of fact, every word must mean something to me. So is the majority aspect of significance or isn't it of significance?

Mr. Lipnick: If the Examiner please, the only thing that is of significance as far as this witness is concerned is that Universal-Rundle Corporation—I think Mr. Depro has one or two questions in this line of questioning, but basically what we are attempting to bring out is that Universal-Rundle Corporation sells basically to two types of

customers. One is Sears, Roebuck & Company, and the other is plumbing wholesalers or jobbers.

Now, these plumbing wholesalers do not confine themselves 100 per cent to wholesaling operations and to sales at wholesale.

Hearing Examiner Buttle: Let me stop you there. What you want to bring my attention to by this evidence is that they sell substantially to retailers. Isn't that it?

Mr. Lipnick: No.

Hearing Examiner Buttle: Well, what is the signi-
11 ficance of the majority? I mean—

Mr. Lipnick: We are only attempting to bring out the customer classification used by Universal-Rundle and the way that Universal-Rundle considers its own customers and what they deal with them.

Hearing Examiner Buttle: Then all you want to bring out is that whether it is a majority or not a majority is of no significance. They sell to wholesalers and they sell to retailers, period. That is the thing that is of significance and whether it is a majority or fifty per cent or fifty per cent the other way doesn't make any difference.

Mr. Lipnick: I don't think the exact percentage makes any difference.

Hearing Examiner Buttle: Whether it is a majority doesn't make any difference, does it?

Mr. Lipnick: No, I don't think so.

Hearing Examiner Buttle: That is what I want to have clear.

Mr. Lipnick: The only thing that is significant is that all of Universal-Rundle's customers, and I hope you will correct me if I am wrong in making this statement, Mr. Backner, the only thing that is of significance here is that all of Universal-Rundle's customers other than Sears, Roebuck & Company, are wholesalers and some of them do make some sales at retail, but Universal-Rundle considers

12 them all to be wholesalers and they all claim to be wholesalers, at least insofar as the dealings with the Universal-Rundle are concerned.

Hearing Examiner Buttle: All right. But when questions are asked, I pick up these words and when you are talking about majority, I say, is that supposed to mean anything? I didn't think it did but I just wanted to make sure.

All right. Go ahead.

By Mr. Depro:

Q. I don't want to carry this too far, but I think it would mean something to Universal-Rundle and I think—I wanted to find out the facts as to just how they characterize these customers to whom they sell.

Hearing Examiner Buttle: Yes. All right. I understand it now. From the viewpoint of the theory of your case, there is no significance to it and I wouldn't imagine there would be. I was just puzzled because that aspect of it, the percentage aspect, seemed to be stressed and to me it seemed to be very important and if it was important, I wanted to know why.

All right. Let's go ahead.

By Mr. Depro:

Q. Mr. Backner, do you sell to any other customers, classes of customers, than the ones you have just described?

13 A. Today? Or are you—

Q. In 1957.

A. In 1957 we sold the class of customers who are known as DTU's They purchase at wholesale and sell at retail. Now, even those customers do a certain percentage of wholesale business.

Hearing Examiner Buttle: What does DTU mean?

The Witness: Direct to you. It is an industry term, sir.

Hearing Examiner Buttle: All right.

By Mr. Depro:

Q. And were there any other classes or groups of customers in 1957 than these 3,00[illegible] that you have mentioned? One is just Sears and the other was the wholesalers, and then the direct to you group.

A. We sold hoppers to marine supply manufacturers who assembled the vitreous china hoppers with valves and pumps and in turn sold them to either marine suppliers or to yacht dealers.

Q. Now, what was the—strike that.

Would you say, then, that sales to the wholesalers and sales to Sears constituted the great majority of the sales of—

Mr. McAleer: I object to that, Mr. Buttle. I think he should be more specific. I don't know what he means by great majority.

Hearing Examiner Buttle: Objection sustained. You have already—anyway, that was not particularly significant.

Read the question again, please.

(The record was read by the Reporter, as requested.)

Hearing Examiner Buttle: Sustained.

By Mr. Depro:

Q. Mr. Backner, to whom do the wholesalers resell the products that are purchased from Universal-Rundle?

A. Wholesalers generally sell to plumbing contractors.

Q. And to whom else?

A. Occasionally to consumers.

Q. Now, how many customer accounts did you have in 1957?

Mr. McAleer: Mr. Buttle, is Mr. Depro eliciting—are his

questions directed to the Philadelphia-Camden area in 1957? Was he talking in terms—

Hearing Examiner Buttle: I think we can assume that they are directed to the Philadelphia-Camden area in 1957. His statement, his opening statement, was that the proof was to be limited to that area and to the particular year 1957. At least I assumed that to be the case. Am I right, Mr. Depro?

Mr. Depro: That is true. Just as a matter of information as to how many accounts they had placed—

Hearing Examiner Buttle: This is really just introductory, just an introductory matter, but that is a good point and I am assuming that insofar as the charges themselves are concerned, they relate to the year 1957 and they relate to the Camden-Philadelphia area or Phildelphia-Camden area.

Mr. Depro: Yes.

Hearing Examiner Buttle: All right.

By Mr. Depro:

Q. Can you answer it, then, for the Philadelphia-Camden area?

A. I would say approximately twelve. This is an approximate number.

Hearing Examiner Buttle: How many in Pennsylvania and how many in New Jersey in that area?

The Witness: Frankly I can't answer that, sir.

Mr. McAleer: Mr. Examiner, if we could, could we have the question reread, please?

Hearing Examiner Buttle: My question or—

Mr. McAleer: No. Mr. Depro's question.

Hearing Examiner Buttle: All right. Will you read Mr. Depro's question.

(The reporter read the question as follows:

"Question: Now, how many customer accounts did you have in 1957?")

16 By Mr. Depro:

Q. Mr. Backner, does that twelve include all of those accounts to whom Rundle sold products in 1957?

A. In the Philadelphia-Camden area?

Q. Yes.

A. Yes. I told you it was an approximate number.

Q. Can you approximate for us the number of accounts that Rundle had all over the country in 1957?

A. I would say approximately 8,000.

Q. Approximately 8,000.

A. Yes.

Q. Now, would—strike that.

Do you have your areas of sales, sales areas, divided by states or regions or just how—

A. They are defined as regions. They don't necessarily follow state lines. They cut across state lines. They are confined usually to certain marketing areas.

Q. Well, now, in 1957 was the Philadelphia-Camden area in the Washington office?

A. No.

Q. It was not?

A. No, sir.

Q. What was the—how do you describe the Philadelphia-Camden area in your sales terminology?

A. It was in the Camden office.

17 Q. Camden office?

A. Yes.

Q. And that means there was a—who was in charge of the Camden office?

A. In—

Q. Not his name but what was the title?

A. Regional Sales Manager.

Q. Regional Sales Manager in Camden?

A. That is right.

Q. Who was the Regional Sales Manager in 1957 in Camden?

A. D. J. McCarthy.

Q. D. J. McCarthy? Is he still in the company?

A. Yes.

Q. Still Regional Sales Manager?

A. No. General Sales Manager.

Q. Where is his office now?

A. New Castle, Pennsylvania.

Q. Now, what were his duties with regard to the accounts in Philadelphia?

A. Supervising the sales representatives.

Q. Did he call on those accounts from time to time?

A. Yes.

Q. And how many salesmen would be calling on the accounts in the Philadelphia-Camden area in 1957 in addition to Mr. McCarthy?

18 A. I believe it was four.

Q. Was that the way sales were obtained, through the salesmen calling, or did the customers—

A. That is right.

Q. —phone in or just how was it done?

A. Well, ordinarily—orders are received in a variety of ways. Sometimes the salesmen got the order. Sometimes the customer telephoned the order into the office. Sometimes the customer sent the order directly to New Castle.

Q. Now, do you have any other area in the United States where that—in 1957—where you had more customers than you did in the Philadelphia-Camden area?

A. Oh, yes, I imagine we had several areas.

* * * * *

20 Mr. Depro: Mr. Examiner, I would like to have marked as Commission's Exhibit No. 1 a copy of the 1957 annual report of Universal-Rundle Corporation which

shows the sales for the years 1957 and 1958, but we are confining it to 1957, and it also shows the list of, some locations of some sales offices and show rooms.

(The document referred to was marked Commission Exhibit No. 1 for identification.)

21 Mr. Depro: I would like to ask the witness if that is a copy of the annual report of the company.

The Witness: May I correct you, Mr. Depro? This shows the sales in 1956 and 1957.

By Mr. Depro:

Q. I'm sorry. That is right.

A. You see, it is the year ended January 31, 1958, which is our fiscal year.

Q. Fiscal year ending January, 1958. I'm sorry. Thank you, sir.

A. And it shows sales offices, warehouses and plants and show rooms.

Hearing Examiner Buttle: Well, it shows the fiscal year ending when?

The Witness: January 31, 1958, and January 31, 1957. It is for our fiscal years 1956 and 1957.

By Mr. Depro:

Q. So the eleven months of 1957 are in the—it shows just the extent of the sales.

A. Yes.

Mr. Depro: I offer this in evidence.

Hearing Examiner Buttle: Any objection?

Mr. McAleer: No objection.

Hearing Examiner Buttle: All right.

Could I see it?

22 The Witness: Yes, sir.

Hearing Examiner Buttle: All right. Commission's Exhibit No. 1 heretofore marked for identification is received in evidence.

(The document heretofore marked Commission's Exhibit No. 1 was received in evidence.)

By Mr. Depro:

Q. Mr. Backner, would you say that your duties as Vice President in charge of marketing include the responsibility for being familiar with the plumbing fixture market in general?

A. Yes.

Q. And do you keep yourself abreast of that market in general?

A. Yes, sir.

Hearing Examiner Buttle: Are you familiar with it insofar as the Philadelphia-Camden area is concerned?

The Witness: Yes, I am.

Hearing Examiner Buttle: Were you familiar with it in the Philadelphia-Camden area in 1957?

The Witness: Yes, sir.

By Mr. Depro:

Q. Now, who are the other producers of similar products, plumbing and fixtures, bathroom fixtures and sinks, in addition to Universal-Rundle that you compete with?

23 A. American Radiator and Standard Sanitary Corporation; Kohler Company; Crane & Company; Elger Division of Murray Corporation; Ingersoll-Humphries Division of Borg-Warner Company; Rheem-Richmond; National Plumbing Fixtures; Gerber Plumbing Fixtures; Peerless Pottery; Kilgore Ceramics; Mansfield Sanitary Pottery; Western Potteries; Dixie Pottery; Southern Porcelain Company; Ford Porcelain Works; Chicago Pottery Company, Norris Thermidor Company.

Q. Did you compete with all of these companies in 1957 in the Philadelphia-Camden area?

A. No.

Q. Which ones did you compete with in 1957 in the Philadelphia-Camden area?

A. American Standard, Kohler, Crane, Rheem-Richmond, Elger, Mansfield, Gerber, Peerless, Ford's Porcelain, Ingersoll-Humphries, National Plumbing Fixtures. I may have omitted some. I am not too sure of it.

Q. I see.

Hearing Examiner Buttle: When you say you were competing with them, you mean you were seeking the same customers that they were.

The Witness: That is right.

Hearing Examiner Buttle: And selling to some of the same customers that they were.

The Witness: That is very true, sir.

24 By Mr. Depro:

Q. Mr. Backner, did all of these customers that you named as competitors in Philadelphia and Camden, in that area, in 1957 produce either cast iron or vitreous china plumbing fixtures?

A. That is right, sir.

Q. They did.

Now, do your duties include familiarity with Universal-Rundle's methods of production?

A. I didn't quite catch that, Mr. Depro.

Q. I say, would your duties have included a major—were you familiar or have you been familiar or are you familiar with the production of products?

A. Yes, I am.

Mr. McAleer: I object to that, Mr. Buttle. I don't know what he means by familiar with the production of plumbing fixtures.

Mr. Depro: The witness knew. He answered it, Mr. Examiner.

Hearing Examiner Buttle: Well, yes. I mean—

Mr. Depro: If he doesn't know—

Hearing Examiner Buttle: I suspect the witness knows what is meant by that but did you have anything to do with the production?

The Witness: Only in my official capacity, not with the actual production.

Hearing Examiner Buttle: What did you have to do with production? I am sustaining your objection.

The Witness: Reviewing production figures and methods, visiting plants, discussions on new products.

Hearing Examiner Buttle: That was in your executive capacity as vice president.

By Mr. Depro:

Q. Would that have gone back at least to 1957 or prior to that?

A. Yes, sir.

Hearing Examiner Buttle: In fact, it was in 1957.

The Witness: Yes, sir.

By Mr. Depro:

Q. Are you a director of Universal-Rundle?

A. Yes, I am.

• • • • •

By Mr. Depro:

Q. Mr. Backner, did you—you are here in obedience to the subpoena, the subpoena duces tecum? You are here in obedience to the subpoena duces tecum?

A. Yes, I am.

Q. Do you have the documents that were called for under Specification 1?

A. Yes, sir, I have.

Q. Of the subpoena? Could I have them, please?

• • • • •

34 Mr. Depro: Mr. Examiner, the witness has produced a number of documents. They are invoices to a number of customers of Universal-Rundle Corporation. The question comes up now as to just how to put these in the record. Mr. Lipnick suggests this, and I am in accord with it, that we take these invoices and put them in chronologically instead of separating them as to customer chronologically. And I understand Mr. McAleer and Mr. Fruchterman object to that; is that right? What we want to do is clear the atmosphere as to just how they should go in.

Mr. McAleer: First of all, if Mr. Depro proposes to put the invoices in of Mr. Bachner to determine whether or not these customers compete with one another, does he plan to list whether the products are like grade and quality that might be sold to Sears, Roebuck? We are not going to let these invoices go in willy-nilly.

Hearing Examiner Buttle: Then you are in a position where you will have to lay the foundation with regard to them and, as a matter of fact, you have the witness
35 here, and insofar as the order producing the evidence is concerned, as long as you adduce it in some reasonable order there won't be any question, I am sure. But what I am being told is that before you can get them in you are apparently going to have to lay the foundation for getting them in.

Mr. McAleer: Mr. Examiner, we can't put all of these things in at once; and these are documents from the files of the Respondent and this witness is in charge of sales.

Hearing Examiner Buttle: All I meant was that you are not going to get any help from the Respondent in getting them in; you are going to have to get them in the usual way.

Mr. Lipnick: Mr. Examiner, the only problem right now is we have these invoices in envelopes and they are now segregated by customer, and our feeling was putting them

in chronologically without separating them by customer would make the record easier to deal with in the case of briefing the case from our standpoint and in the case of deciding the case from your standpoint.

Hearing Examiner Buttle: How would that be? I should think perhaps it would be just as logical to say they be introduced by customer.

Mr. Lipnick: For this reason, sir. There are actually two separate violations that were charged in this case
36 and one of those two violations which is alleged is discrimination among Universal-Rundle's wholesale customers which would, of course, be sales of identical products. And in terms of comparing invoices to see who bought what at what price and comparing reasonably contemporaneous sales, it is my feeling the record would be easier to deal with if those invoices were close together in the record; and if they are broken up by customer we will be flipping from one end to the other; and if they are in chronological order there would not be that necessity.

Hearing Examiner Buttle: Yes, but isn't the crux of what I have to consider what one customer got as opposed to another?

Mr. Lipnick: Yes, certainly.

Hearing Examiner Buttle: Isn't that the basis upon which I should consider these documents then?

Mr. Lipnick: Absolutely. But in terms of considering what customer got in relation to the other, reference to the invoices will be necessary to determine who bought what at what price.

Hearing Examiner Buttle: Well, I am interested in finding out what one customer got that the other customer didn't get, so I would be weighing the evidence customer against customer, wouldn't I? That is just what bothers me. You say that you want to adduce the evidence in
37 chronological order regardless of customer?

Mr. Lipnick: Yes, because these invoices will not show that one customer got a uniform fifty percent discount and another customer got a uniform forty percent discount. These invoices will show just to take a hypothetical instance without making any representations that are in here, that one customer bought, let's say, product 2100, which I believe is a bath tub, one customer bought product 2100 on April 6th for $50.00 and on April 7th another customer bought product number 2100 for $55.00. Now, this is how these discriminations will be shown because, frankly, I don't think there was any uniform arrangement with any.

Hearing Examiner Buttle: In other words, what you are telling me is the proximity of time in relation to the sale is the factor which you want to emphasize, and if you adduce the evidence that way, comparing the customers, the proximity of time will emphasize the fact that the prices should have been the same. But it is your claim that they weren't the same?

Mr. Lipnick: Yes.

Hearing Examiner Buttle: That is it?

Mr. Lipnick: Yes, on that basis I think the record will be easier to deal with.

Hearing Examiner Buttle: I will, as a matter of fact, — I will assume that in briefing the case I will hear about
38 it from both perspectives, but I will permit you to proceed either way. You may establish your case the way you wish to provided that it is reasonable; and that appears to be reasonable.

Mr. Fruchterman: Your Honor, may I ask counsel for the Government whether he intends to introduce every invoice?

Mr. Lipnick: I feel that will be fairly short.

Mr. Fruchterman: This goes to the question of putting in chronological order or by order of witnesses, because if he doesn't we are going to, and then we are going to have a

situation where we get some invoices by chronological order and others by customers, and it will be very confusing.

Hearing Examiner Buttle: Well, it won't be confusing for the very simple reason that I may direct that a memorandum be prepared setting it up both ways; so don't worry about that. I am anxious to have both perspectives, so I won't be concernod about that.

Mr. Depro: Mr. Examiner, I think it would facilitate the hearing here if we, in spite of the advantages in briefing the matter, if we take it by customer and mark a number and then the alphabetical attachments for each invoice for that customer.

Hearing Examiner Buttle: I am permitting you to 39 do it either way you wish to. Let's make up our minds, that is all.

Mr. Depro: Because it will require more time to get these in chronological order in order to put them in the other way.

Hearing Examiner Buttle: You do it whichever way you want to. You are certainly in a position to submit a memorandum to me setting it up in chronological order if you wish to. If you have the documents in evidence there is nothing to prevent you showing me anything you wish to show me by way of charts and otherwise regarding evidence that has been introduced; and the same thing as Mr. Lipnick has suggested; whichever way you do it. So I will permit you to do it either way; it is up to you.

Mr. Depro: Well, in any event, I think we will have to have a little more time to get these in order.

Hearing Examiner Buttle: Well, do you have them in order by customer now?

Mr. Depro: We have them by customer, yes.

Hearing Examiner Buttle: I thought you were just telling me that is the way you wish to introduce them.

Mr. Depro: We would like to.

Hearing Examiner Buttle: You may. I have told you you can do it either way you wish to.

Mr. Depro: All right.

40 By Mr. Depro:

Q. Mr. Backner, are you familiar with the Mars Supply Company?

A. Sure.

Q. Have you ever called on them in business?

A. No, sir.

Q. Do you know that Universal-Rundle sells merchandise to Mars or has sold to Mars?

A. Sold them in 1957.

Q. Did sell in 1957?

A. Yes.

Q. I will ask you the same with respect to the Central Supply of Camden; did Rundle sell to Camden?

A. Yes.

Q. In 1957?

A. Yes.

Q. And I will ask you the same with respect to Henry Supply Company?

A. Yes, they sold in '57.

Q. Black and Brown, Inc.?

A. Yes.

Q. Harry A. Arensberg of Camden?

A. Yes.

Q. Richmond Plumbing Supply?

A. Yes.

41 Q. Girard Supply Corporation?

A. Yes.

Q. Hajoca?

A. Hajoca Corporation.

Q. And Nat Friedman & Sons?

A. Yes, sir.

Q. And Camden Plumbing Supply Company?

A. Yes, sir.

Q. Now, were all of those companies that I have just named wholesale plumbing houses?

Mr. McAleer: I object to that, Mr. Buttle.

Mr. Depro: If you know?

Mr. McAleer: If he wishes to do it on a cunstomer basis I will be happy.

Hearing Examiner Buttle: I don't know and I can appreciate your point, but you can answer that, if you know.

The Witness: It is very difficult to answer, Mr. Buttle, because these little firms to whom we sold in '57 did a variety of businesses. Some people classified them as wholesalers and some people classified them as retailers. I really don't know how to answer that as a positive statement.

Hearing Examiner Buttle: In other words, you couldn't answer the question with a reasonable degree of certainty; is that what you are telling me?

42 The Witness: Yes.

By Mr. Depro:

Q. Mr. Bachner, how did Universal-Rundle classify Mars Supply Company in 1957?

Mr. Fruchterman: We object. He hasn't laid any foundation to show that they have a practice of classifying these customers and classifying as to what, as to Philadelphia, Camden, as to prices he paid, as to merchandise?

Hearing Examiner Buttle: Are you required to classify your customers?

The Witness: No, sir, we do not.

Hearing Examiner Buttle: The objection is sustained.

Mr. Fruchterman: I am still—

Hearing Examiner Buttle: I have sustained your objection. You are not arguing with me, are you?

Mr. Fruchterman: No, sir, we are not.

Oh, I thought you hadn't.

Hearing Examiner Buttle: Maybe we don't hear each other, and it is probably so.

By Mr. Depro:

Q. Mr. Bachner, among the classes of customers that you have heretofore described, namely, wholesalers, DTU's and Sears, what class would the Mars Company be in?

A. I would classify them DTU.

43 Q. How would—Strike that. What is the basis for that classification, Mr. Bachner, will you tell us?

A. Because to the best of my knowledge they sold mostly to retail.

Q. They sold mostly to retail?

A. Uhuh.

Q. And Universal-Rundle sold them at wholesale, is that right?

Mr. Fruchterman: We object, your Honor.

Mr. Depro: That is what he said, the DTU's were, he said, they purchased it wholesale.

Mr. Fruchterman: Your Honor—

Hearing Examiner Buttle: One at a time.

Mr. Fruchterman: For one thing they sold them at wholesale, the manufacturer sells, he is not a wholesaler, he is not a retailer; he just sells. If Mr. Depro intends to convey that there is such a thing as a wholesale price on the part of Universal-Rundle he hasn't laid any foundation for it, and certainly there is nothing in the record which would indicate that they did so. He is presuming there is some type of selling arrangement that goes by the nomenclature wholesale as far as Universal-Rundle's business is concerned.

Hearing Examiner Buttle: Well, of course, in examining a vice-president of the Universal-Rundle Corporation,

44 he has more latitude than he might otherwise have. Read the question to me again.

(The pending question was read by the Reporter.)

Hearing Examiner Buttle: I will allow the question. The witness is vice-president of the Respondent Corporation.

The Witness: May I answer that?

Hearing Examiner Buttle: If you can.

The Witness: By saying that we sold all of our customers with the same price, generally speaking. In other words, there would be no difference between selling Mars and selling any other customer in Philadelphia.

By Mr. Depro:

Q. Did you sell in accordance with a printed price list in 1957?

A. The printed price list served as a basis for pricing only.

Q. What do you mean by that?

A. Well, we sold competitively. All manufacturers of plumbing fixtures issue a price list which serves as a basis for pricing. From that price list they are given certain discounts; discounts for truck loads or car loads, discounts on projects where bids are made on a certain specific project; so that is what I would say the price list serves as the basis for pricing.

45 Q. You say discounts for truck load and truck load purchases and discounts for projects?

A. That is right.

Q. Are there any other trade discounts?

A. Display discounts.

Q. Display discounts?

A. Uhuh.

Q. Would you define that for us?

A. If a customer or a customer's customer displays

our product for a period of a year we issue a twenty-five percent discount.

Q. In the show room—

A. Of either the wholesaler or DTU or the plumbing contractor.

Q. Now, do you refer to these price lists as wholesale price lists or just how do you refer to them?

A. We refer to them as wholesale net prices.

Q. And do you refer—well, do you refer to the retail price in the price list?

A. We have a suggested consumers price.

Q. Consumers price?

A. It is only a suggested consumers price.

Q. And that is the price that the wholesaler has suggested or the retailer has suggested to sell to the consumer; is that right?

46 A. Yes. I don't think anyone ever uses it, frankly. It is a gratuitous suggestion.

Q. Well now, how would you describe—Strike that. Would the Central Supply Company of Camden be considered a DTU or a wholesaler or what in 1957?

A. I don't know because they changed their method of operation sometime around 1957, so I can answer that.

Q. I see. How about the Henry Supply Company of Camden?

A. They were DTU.

Q. Was there any difference in the sale of products to the wholesaler than in the sale of the same products or the same kind of products DTU account?

Mr. McAleer: I object, Mr. Buttle. I don't know what he means.

Mr. Depro: I am asking him if there is any difference in the sale of Universal-Rundle products to an account that you would classify as a wholesale account as com-

pared with the sale of products by Universal-Rundle to an account that you would class as a DTU account.

Mr. McAleer: Is he referring to the difference—Is he talking in terms of price; is he talking in terms of different products?

Mr. Depro: Same products to the two different classes of accounts.

47 Hearing Examiner Buttle: I will sustain the objection, but you may pursue the inquiry, but reframe the question. I think it would be easier if you put less in each question.

Mr. Depro: All right.

By Mr. Depro:

Q. When you sell to—When Universal-Rundle sold to the Henry Supply Company in 1957, which you characterized as a DTU account, how did the mechandise, how was it delivered to the Henry Supply Company?

A. Frankly, I don't know.

Q. What does direct to you mean?

A. "Direct to you" is a wholesaler-retailer. It is a trade term. It is usually an individual who has a store and he may sell some plumbing contractors but eighty percent or ninety percent of his business is done with the consumer. He sells over the counter.

Q. Do you sell to the wholesaler direct or indirect?

Mr. McAleer: I object, your Honor. I don't know what he means by direct or indirect.

Mr. Depro: I am trying to find out what the difference is between the terms.

Hearing Examiner Buttle: Well, do those terms mean anything to you?

The Witness: We—

48 Hearing Examiner Buttle: What is a direct sale and what is an indirect sale?

The Witness: A direct sale is a sale by an individual who buys it wholesale direct to the consumer. Now, the wholesaler sells the majority of the products he buys from the manufacturer to a plumbing contractor, who, in turn, sells to the consumer. In other words, the TDU's is skipping one phase of distribution in there.

By Mr. Depro:

Q. Do you deliver from the plant or plants of the Universal-Rundle Corporation direct to a wholesaler's place of business?

A. Yes.

Q. Do you deliver from the Rundle plant or plants direct to a DTU's place of business?

A. We can.

Q. Do you?

A. Yes.

Q. In 1957?

A. To the best of my knowledge, Mr. Depro, a company like Henry Supply would pick up at the plant rather than having any deliveries made to them.

Q. I see. And where would that plant be?

A. In Camden, New Jersey.

Hearing Examiner Buttle: Well, in some instances
49 did you deliver?

The Witness: In some instances we probably did. I have no knowledge.

Hearing Examiner Buttle: Well, from your experience as vice-president, would you say it would be the usual and customary practice to deliver?

The Witness: I don't know whether I could answer that, Mr. Buttle.

Hearing Examiner Buttle: If you can't say so; that is all.

The Witness: Because a local company the size of Henry Supply would probably pick up most of the material.

Hearing Examiner Buttle: I am not speaking about that company, but I am speaking about other companies with regard to which it would be your usual practice?

The Witness: Excuse me, I thought Mr. Depro was referring to Henry Company, but to the others, yes, we deliver.

By Mr. Depro:

Q. And do you price the merchandise on a delivery basis or is it a separate item?

A. Our product is sold FOB plant with carload freight allowed on carload or less than carload shipments.

Q. Was that the same, did that prevail in 1957?

A. That is right.

Q. How much— What do you mean by less than carload shipments? Is that what you said?

A. I mean any shipment that doesn't equal the minimum carload or the minimum truckload.

Q. You charge the freight; is that what you are saying?

A. No, our material is shipped FOB plant. In other words, technically it leaves our possession as soon as it is loaded on the carrier, the freight lines or the motor carrier. Now then, if it is a full carload or full truckload we allow full carload or full truckload rate of freight. In other words, it doesn't cost the customer anything for the transportation to his place of business. However, if it is less than the minimum truckload or less than a minimum carload we only allow the full carload or truckload rate and the customer has to pay the difference between the truckload rate and his actual cost of transportation, which of course, is greater than the minimum truckload or carload rate.

Q. Well, those in the second category that you have just mentioned, do those items appear on the invoices?

Mr. Fruchterman: The invoices will speak for themselves.

Hearing Examiner Buttle: On what invoices are we talking about now?

51 Mr. Depro: On the invoices.

Hearing Examiner Buttle: Their invoices?

Mr. Depro: Their sales invoices.

The Witness: Our sales invoices would show the actual freight allowance.

Hearing Examiner Buttle: If there was an allowance but, of course, if it was FOB there would be nothing?

The Witness: No, there would be an allowance, sir, if any shipment that weighs over two-hundred pounds gets a freight allowance.

Mr. Depro: And did that same obtain in 1957?

The Witness: Yes.

Hearing Examiner Buttle: If it is over two-hundred pounds?

The Witness: If it is over two-hundred pounds—

Hearing Examiner Buttle: There is a freight allowance?

The Witness: There is a freight allowance.

53 By Mr. Depro:

Q. Mr. Backner, what class of the classes of customers that you have already named of Universal-Rundle was the Black and Brown, Inc.?

54 A. I don't know.

Q. You do not?

A. I don't.

Q. Do you know what class Harry Arensberg was?

A. He was DTU.

Q. DTU. This was in 1957?

A. 1957.

Q. How about the Richmond Plumbing Supply? Do you know what class that was?

A. I can't classify it.

Q. How about the Girard Supply?

A. They were wholesalers.

Q. Wholesalers. And how about Hajoca Corporation?

A. Wholesalers.

Q. Nat Friedman & Sons?

A. I can't classify them.

Q. Camden Plumbing Supply?

A. They were wholesalers.

Q. Well, now, would there be—strike that.

You mentioned a project, I believe, in connection—

A. Yes.

Q. Would you explain what you meant by that?

A. A project is either a speculative housing project which may contain, oh, anywhere, from 50 up to 1,000 houses or an apartment house with many apartments in it, a school building, a hospital building, an office building, Post Office, any type of commercial institutional building that is classified as a project.

Q. Well, how does that come to your attention, to the Universal-Rundle's attention?

A. We are asked to quote.

Q. And who asks you to quote?

A. Our customers.

Q. That is, would you say that that was an unusual situation or—

A. No, sir.

Q. —or is that usual?

A. Usual situation.

Q. It is very customary?

A. Very common.

Q. I see. Now, do you give special quotations to customers—

A. Yes, we do.

Q. —that request quotations for projects?

A. Yes, we do.

Q. Did you—strike that.

Would you bill your customers in the same way for merchandise that was supplied for projects as you would for regular merchandise? I mean by that, on the same invoices?

A. Yes.

56 Q. Would the invoice describe the project as the project?

A. Not necessarily.

Q. Not necessarily. But does that mean that sometimes they could describe—they did describe the special—

A. Sometimes they described it if the material all happened to be for the same project. We depended on our customers to keep those projects straight and know where the material was going when we delivered it to them.

Q. And would the project quotations be lower than the list prices?

A. Yes, usually.

Q. Now, in 1957 did you have any system or any standard for determining what project quotations would be?

A. No, sir. There never have been, I can tell you, standards for project locations.

Q. Could you tell us how you arrived at the prices that you quoted for a project?

A. Strictly based on competition.

Q. Would you have anything to do with the determination of those prices yourself?

A. I do.

Q. In 1957?

A. I do to a certain extent. I okay some, but not all of them, particularly for the larger projects.

Q. Do you know that other plumbing supply houses
57 also make quotations for projects?

A. Oh, yes, they all do.

Q. They all do?

A. Yes.

Mr. Fruchterman: Your Honor, I would like to—like some definition of a plumbing house, whether he means a manufacturer or wholesaler or just what he means.

Mr. Depro: I meant other manufacturers.

By Mr. Depro:

Q. Did you understand it to mean that?

A. Yes. I understood it to mean other manufacturers.

Q. That is what I meant.

A. Yes.

Hearing Examiner Buttle: Those points I think I would clarify on cross-examination unless I had an actual objection.

By Mr. Depro:

Q. Now, would you say, or do you know, Mr. Backner, whether every request for quotation for a project resulted in giving a quotation?

A. I would say yes.

Q. Every time there was a request, is that right?

A. Every time it came from one of our customers, we would quote it.

Q. I see.

58 Who would—did you have anything to do with the determination in those instances of whether a price should be given or not or was that someone else's—

A. The custom is that—

Mr. McAleer: I object, Your Honor. I think he has already answered the question and established the fact that

in certain instances he would pass on them or approve the prices. I think he has already answered the question.

Hearing Examiner Buttle: Yes. Hasn't he really answered that?

Mr. Depro: Maybe he has, Mr. Examiner, but I—

Hearing Examiner Buttle: Well, he did say he approved the prices.

By Mr. Depro:

Q. Would there be anyone else in addition to yourself that would be considered in the determination of these prices?

A. Up to a certain point, yes. We usually went on the size of the project and the necessary price to go in order to get it. If it was up to a certain point, the manager of customer service who attends to quotations might approve the project but they are usually brought in to me to review and okay the lowest prices.

Hearing Examiner Buttle: So that you would have the opportunity of disapproving, if necessary.

The Witness: That is right, sir.

59 By Mr. Depro:

Q. Was there any determination or were there any steps taken, Mr. Backner, to determine, to assure that the goods, products, that were sold for project purposes actually went into the project?

A. We endeavor to check those things. As a matter of fact, we discontinued selling one customer because we found out that he was asking for phony projects and using material for stock. We try to check them but you understand that with our limited force, it is impossible to check all of them.

Q. You make a reasonable effort to—

A. We make a reasonable effort to check all projects. Usually projects are easy to check because you get a re-

quest for more than one customer to quote on the same project.

Mr. Depro: Mr. Examiner, I would like to have marked as Commission's Exhibit 2 for identification a document entitled "Agreement Between Universal-Rundle Corporation and Sears, Roebuck," dated February 1, 1956. It is stapled together and it is a ten-page document with a schedule A of three pages attached to it. It does not bear the signatures of any—of either of the two parties but it was delivered to us, supplied to us in response to the subpoena as the agreement existing during the year 1957 between the respondents, Universal-Rundle, and Sears, Roebuck.

60 I would like to have that marked as Commission's Exhibit No. 2.

(The document referred to was marked as Commission's Exhibit No. 2 for identification.)

Mr. Depro: Do you want each page with a letter or should—

Hearing Examiner Buttle: Obviously counsel for the respondent has seen it, but is there any question with regard to its authenticity insofar as it being an effective document completely executed?

Mr. McAleer: No. There is no doubt about that point, Your Honor.

Hearing Examiner Buttle: In other words, counsel for the respondent concedes that this is a document duly executed and signed by the appropriate officers of the Universal-Rundle Corporation.

Mr. McAleer: That is correct, Mr. Examiner.

Hearing Examiner Buttle: And in effect during the period the contract describes.

Mr. McAleer: That is correct.

Hearing Examiner Buttle: All right. Is there any objection to this being received in evidence?

Mr. McAleer: I have no objection.

Presiding Examiner: Received in evidence for other reasons?

61 All right? No objection. Accordingly, Commission Exhibit No. 2 heretofore marked for identification is received in evidence.

(The document heretofore marked COMMISSION'S EXHIBIT 2 for identification was received in evidence.)

Hearing Examiner Buttle: Is there any particular item or paragraph in there you wish to invite my attention to? Of course, I will examine the contract completely.

Mr. Depro: There is no particular paragraph at this time, Mr. Examiner. I haven't looked at this closely.

Hearing Examiner Buttle: Is there anything about the contract you wish to invite my attention to, because I am interested in learning about the case as I proceed.

Mr. Depro: This contract has a Schedule A which purports to be a definition of manufacturing costs and it is essentially a cost-plus contract, I believe, and which indicates that the prices that the respondent has made to Sears are on a different basis than they are to the trade customers.

Hearing Examiner Buttle: All right. That is what you are inviting my attention to about that contract.

Mr. Depro: Yes, sir.

Hearing Examiner Buttle: Off the record for just a moment.

62 (Discussion off the record.)

Hearing Examiner Buttle: Back on the record.

Mr. Depro: May we have just a moment, Mr. Examiner?

Hearing Examiner Buttle: All right.

(Discussion off the record.)

By Mr. Depro:

Q. Mr. Backner, under this document that is marked Commission Exhibit No. 2, how does the Sears, Roebuck

Company order the projects that they have agreed to purchase as a result of that document? Can you tell us?

A. I'm sorry, I can't answer that question, Mr. Depro. I have actually no idea.

Q. You cannot?

A. I have just about nothing to do with Sears, Roebuck contracts or the way they order material.

Q. Does the sale of goods to Sears come under your jurisdiction?

A. No, it does not.

Q. It does not. That is separate.

A. That is separate.

Q. Who has charge or control of the sales to Sears for 1957?

A. 1957—that was under the direct charge of Mr.
63 Clyde Whittaker.

Q. Mr. Whittaker?

A. That is right.

Q. Was he the president of Universal-Sanitary?

A. And president of Universal-Rundle.

* * * * *

87 Mr. Lipnick: Mr. Examiner, I now ask that these
88 documents be marked for identification as Commission Exhibits 74 through 79.

(Commission Exhibits 74-79 were marked for identification.)

Hearing Examiner Buttle: Has counsel for the Respondent seen the documents?

By Mr. Lipnick:

Q. Mr. Bachner, I show you Commission's Exhibits—

Hearing Examiner Buttle: I thought you were offering them?

Mr. Lipnick: No, I had them marked for identification, 74 through 79.

By Mr. Lipnick:

Q. Are those the documents which were submitted by you in response to a subpoena duces tecum as to specification number 2 of the subpoena duces tecum?

A. Yes, they were.

Mr. Lipnick: I offer these into evidence.

Hearing Examiner Buttle: Have you any objection?

Mr. McAleer: No objection.

89 Hearing Examiner Buttle: Just a moment. You have offered in evidence Commission's Exhibits 74, 75, 76, 77, 78 and 79 into evidence. I assume that they are offered for the purpose of establishing certain products of Universal-Rundle were sold at prices specified in the price books in the description—No, I should say as described.

Mr. Lipnick: Not entirely.

Hearing Examiner Buttle: In Commission's Exhibit 74; is that it?

Mr. Lipnick: Not entirely, sir.

Hearing Examiner Buttle: What do you mean by not entirely?

Mr. Lipnick: By not entirely, I mean I am about to offer into evidence certain invoices, and it would be my
90 position that those invoices establish prices at which products were actually sold to the customers with whom we are here concerned. However, Commission Exhibits 74 through 79 are offered for the purpose of proving, number one, the wide products which were offered for sale by Universal-Rundle Corporation under its own label; number two, the general prices at which it was usually offered for sale, or at which it was ostensibly offered for sale as the case may be. Number three, certain features with respect to design and physical characteristics of the products as described in those books.

Hearing Examiner Buttle: Well, described in Commission Exhibit 74?

Mr. Lipnick: And I believe there is some description in 79 and one other.

Hearing Examiner Buttle: Well, yes, all right. Accordingly, Commission's Exhibits 74 through 79 are received in evidence. They were heretofore marked for identification.

(COMMISSION EXHIBITS 74 through 79 were received in evidence.)

* * * * *

92 By Mr. Lipnick:

Q. Are you familiar with an individual named Harry Arensberg?

A. I know who he is; I don't know him personally.

Q. Who is he, sir?

93 A. To the best of my knowledge, he is the owner of a plumbing supply company called by his name in Camden.

Q. That would be Camden, New Jersey?

A. That is right.

Q. Was he a customer of Universal-Rundle in 1957?

A. I believe he was.

Q. And to the best of your knowledge, sir, would you characterize his business operations as that of a wholesaler or as that of a DTU?

Mr. McAleer: I object to that, Your Honor. I don't know what he means by characterization. I think he can ask much more direct questions.

Hearing Examiner Buttle: I will sustain the objection, but you may pursue the interrogation of ascertaining information—

Mr. Lipnick: May I be heard, sir?

Hearing Examiner Buttle: Yes.

Mr. Lipnick: This morning Mr. Backner testified, as I recall, that Universal-Rundle sold to three kinds of cus-

tomers. One was Sears, Roebuck and Company. Another—Well, never mind. Strike that.

By Mr. Lipnick:

Q. Mr. Backner, are you or were you familiar in 1957 with the type of business operation conducted by Harry Arensberg?

94 A. By reputation only.

Q. Did you acquire whatever knowledge you did acquire pursuant to your duties as vice-president in charge of marketing of Universal-Rundle Corporation?

A. Yes, sir, I would say so.

Q. Was it part of your duties as vice-president in charge of Universal-Rundle Corporation to be somewhat familiar with the types of business operations conducted by each of Universal-Rundle's customers?

A. Yes.

Hearing Examiner Buttle: You wanted to know what their operation was before you dealt with them, and that is why you made inquiry; is that correct in part?

The Witness: In part.

Hearing Examiner Buttle: All right.

By Mr. Lipnick:

Q. And what type of operations did Mr. Arensberg conduct?

A. By reputation he was a DTU.

Mr. Lipnick: Mr. Examiner, at this time I will ask that these documents be marked for identification as Commission Exhibits 80-A through Z or whatever the appropriate sub-number comes out to be.

Hearing Examiner Buttle: Do you say that you—

Mr. Lipnick: I can count them.

Hearing Examiner Buttle: All right, let the Re-

95 porter mark them. Before you mark them take this on the record.

Mr. Backner, you said that you understood that these were DTU's by reputation. In continuing your business, was it essential that you know whether or not he was a DTU?

The Witness: Not in 1957, sir.

Hearing Examiner Buttle: It was not in 1957?

The Witness: No, sir.

Hearing Examiner Buttle: Was it customary practice to find out?

The Witness: Yes, I would say so.

Hearing Examiner Buttle: And for what reason?

The Witness: That is a rather involved subject, sir.

Mr. Fruchterman: Your Honor, I would like to point out that Mr. Arensberg appears on the witness list and will be in here. He can describe his own business.

Hearing Examiner Buttle: Well, you don't seem to understand that his testimony with regard to the reputation is not admissible for the proof of what is said, and I am just curious in finding out what he acted upon. Are you objecting to the question?

Mr. Fruchterman: I am objecting to the materiality of the questions. What possible difference could it make
96 in this case as to what Mr. Backner thought he was or what anybody thought this man was?

Hearing Examiner Buttle: Well, you didn't stand up and object to the question when it was asked by Mr. Lipnick and Mr. Backner answered the question by saying that he was a DTU by reputation. You just sat there and didn't say a word until I tried to find out what it meant to them to find out. And I will never know whether it is relevant or not unless I do find out from someone, because I am presently sitting with no ideas as to what it can mean to the case; and I am going to find out from Mr. Backner. So if you are objecting, it is overruled. Now, what about it, Mr. Backner?

The Witness: May I go into an explanation, sir?

Hearing Examiner Buttle: Yes, I would like to know why it is important or not important.

Mr. Fruchterman: Your Honor—

Hearing Examiner Buttle: I will find that out from Mr. Backner. Sit down.

The Witness: Many so-called DTU's who are wholesaler-retailers like to consider themselves wholesalers, because that is a step above the DTU. It carries more legitimacy; so although a business man in the plumbing supply business may sell a majority of his fixtures directly to the consumers and a very small percentage to a plumbing
97 contractor, he still likes to be called a wholesaler.

There is a very fine line of demarcation. I didn't know Mr. Arensberg personally. I don't think I have ever called on his place of business, although he was very close to one of our clients, but by reputation I heard, and I always understood he was DTU. Now, in 1957 we weren't too particular to whom we sold. At that time we were trying to clean up our distribution and getting fore reputable wholesalers on our list of customers and that is why I say by reputation I knew him as a DTU. Of my own knowledge, I am not sure he considered himself a wholesaler.

Hearing Examiner Buttle: But did you seek that information from the viewpoint of attempting to categorize him so that you could give a different price to one in one category as opposed to someone in another category; was that your purpose?

The Witness: No, sir.

Hearing Examiner Buttle: What I am trying to find out is what was the purpose of seeking this information and thus classifying them. Was there any purpose as far as your operation was concerned?

The Witness: Yes, sir, it was. A wholesaler was capable of taking a much better class of jobs. He was capable

of supplying commercial projects, institutions and commercial buildings of various kinds and, therefore, we
98 sought generally in improving our distribution that that type of a wholesaler—Now, a DTU never did that kind of business and a DTU handled the cheapest lines of products. He sold over the counter generally to the consumer. He had to sell the cheapest line. Therefore, when we cleaned up distribution we would try to select the wholesaler rather than the DTU.

Hearing Examiner Buttle: In seeking business as far as price was concerned, they were uniform?

The Witness: Providing they bought in the same quantities.

Hearing Examiner Buttle: Well, you shake your hands, Mr. Fruchterman, as if I ought to know, but no one has indicated that so far.

Mr. Fruchterman: I can understand, Your Honor, that you are wishing to pursue the question because you would not know the answer, but what I was trying to do was ask Mr. Lipnick to explain the materiality of the line of questioning, since it was going to become involved in detail.

Hearing Examiner Buttle: As I say, no objection was made to it and the thing for you to have done, if you thought it was immaterial, was to make the objection at the appropriate time, which you didn't do. All right, proceed.

By Mr. Lipnick:

99 Q. Mr. Backner—

Mr. Lipnick: I believe that I requested some documents be marked for identification, sir.

Hearing Examiner Buttle: You believe what?

Mr. Lipnick: I requested—

Hearing Examiner Buttle: The Reporter can mark the documents.

(Commission Exhibits 80 through 80-Z-113 were marked for identification.)

By Mr. Lipnick:

Q. Mr. Backner, does Universal-Rundle Corporation have a system or a method of using numbers to designate plant locations?

A. Yes.

Q. And would you explain how that operates, what numbers designate what locations?

A. I don't know if I can give you the numbers. I can tell you that we used in 1957, we had six plants operating, each one of which had a different number on the invoice to designate which plant had shipped material on the invoice.

Q. Do you know which plant was designated by the number 2?

Mr. Fruchterman: Your Honor, we object to that question. There is an exhibit in evidence which has all that written down on it.

Hearing Examiner: Does it have all?

Mr. Fruchterman: It has all that appears on the Sears sales that he is comparing.

Mr. Lipnick: Does it have all the ones that appear on these trade invoices?

Mr. Fruchterman: It would cover all the minor.

Mr. Lipnick: Do you want to object to the characterization of minor?

Mr. Fruchterman: You know very well it does.

Hearing Examiner Buttle: All right, gentlemen.

Mr. Depro: What exhibit are you referring to?

Hearing Examiner Buttle: I think Mr. McAleer was right in the first place. If we are going to get into this sort of an interrogation the witness apparently is not in a position to know.

Mr. Lipnick: He just said he didn't know. I wasn't going to ask him any more questions.

Hearing Examiner Buttle: So we will have to find out and return to him. Now, are there any more questions like that you are going to ask him?

Mr. Lipnick: I am certainly not going to ask him to return tomorrow to tell me that if that is all I have to ask him.

101 Hearing Examiner Buttle: All right, go ahead.

By Mr. Lipnick:

Q. Mr. Backner—

Mr. Lipnick: Mr. Examiner, if you will recall, Mr. Depro requested that I be permitted to conduct part of the hearing today in connection with the introduction of certain documents and subject to reaching an agreement with counsel for the Respondent as to certain invoices. That has been completed and I will turn the floor over to Mr. Depro, if you have no objection.

Hearing Examiner Buttle: All right.

By Mr. Depro:

Q. Mr. Backner, referring to the documents which have been marked Commission Exhibits 74 through 79, there is a reference in 74 to stock numbers that are listed in the catalogue. Would you take a look at that? Now, would the stock numbers in the catalogue for 1957 and in the price lists of—would the price lists correspond to those stock numbers shown on the invoices when you bill a customer?

A. Yes, they would.

Q. They would?

A. Yes.

By stock number do you mean the catalogue number?

Q. You are looking at page 3 of Commission's Exhibit 74?

102 A. That is right; that is the catalogue number is what you are referring to.

Q. That is right?

A. Yes, sir.

Hearing Examiner Buttle: That is the third column?

The Witness: That is right.

By Mr. Depro:

Q. Would an identical stock number in every case signify an identical products? In other words, if you had on the invoice that would show Number 2100, would that refer to this?

A. Yes, it would refer to that tub.

Q. Page 3 of Exhibit 74?

A. Yes, sir.

103 Q. Now, where you have a Universal-Rundle stock number or catalogue number—By the way, is there a difference between a stock number and a catalogue number?

A. I don't know what you mean by a stock number, Mr. Depro; I have never heard that term used before. We have factory numbers on occasions which may be different from catalogue numbers but I think you are referring to catalogue numbers.

Q. Catalogue number?

A. That is the official fixture number, yes.

Q. I see. Now, where those numbers are composed of 4 digits, if the invoice shows a 5 digit number, what is the significance of that?

A. Well, in cast iron the digit 1 following the cata-
104 logue number signifies acid resisting.

Q. Acid resisting?

A. Yes, sir.

Q. Was that true in 1957?

A. Yes, sir.

Q. Then the other digits from 20 to 8, I believe, signify colors. Are the colors—Well, was the list of colors the same in 1957 as you have had since then?

A. Yes.

Q. And so as the number changes it would stand for a different color?

A. The 5th digit changing would signify a different color or acid resisting.

Q. I see.

Now, what does the description "Reg. En." mean?

A. Regular enamel. And that would be just a 4 digit number or if they wanted to use a 5th digit number it would be an "o".

Q. When you referred to the acid resisting you just used the abbreviation "A.R.?"

A. That is right.

Q. Now, what would be the—For example, in this Commission's Exhibit 74 on page 3, again, what would be the difference between 2100 and 2101; can you tell me?

A. 2100 and 2101, one is righthand outlet and the 105 other is lefthand outlet.

To explain that to you, when you face the tub—you see, tubs are made—these tubs are recessed tubs, they sit in an alcove. You have the outlet of the tub on either the righthand side or lefthand side. The tubs are made in two ways and that difference in that 4th digit signifies the lefthand outlet.

Q. Would the products referred to by those numbers be otherwise identical?

A. 2100 and 2101 are identical with the exception of the outlet and the overflow.

Q. I see. Now, would the price be the same for those?

A. Yes, the price would be the same. It has the same price sheet.

Q. Would your answer be the same with respect to other pairs of products 2110 and 2111?

A. That is right.

Q. Through the rest of these?

A. Through the rest of these tubs.

Q. I see.

Hearing Examiner Buttle: One is a righthand outlet and the other is a lefthand outlet, otherwise they are identical?

The Witness: They are identical.

106 Hearing Examiner Buttle: In design and quality?

The Witness: The difference actually is the punching for the outlet for the overflow, which the plumber must know to install the tub.

By Mr. Depro:

Q. Mr. Backner, I show you Commission's Exhibits 76, 78—76, —75, 76 and 79, and I ask you if these three documents refer to all of the prices that were applicable to the Universal-Rundle trade line for the year 1957?

A. No, sir, they are not.

Q. What other prices?

A. Well, you have the two Exhibits there in your hand, Mr. Depro.

Q. 77 and 78?

A. That is right.

Q. Now, together with 77 and 78, does that represent all of the changes in price that were put into effect by Universal-Rundle during 1957?

A. That represents the official changes in prices, however, these are not the only prices that are available to Universal-Rundle customers in the year 1957.

Q. Are you referring to the projects?

A. I am referring to project prices and display prices.

Q. Prices that you have already testified about?

107 A. That is right; and carload and truckload prices.

Q. Are you familiar with the product numbers 2412 and 2413, the catalogue numbers?

A. May I see the catalogue?

Q. I don't know if I can find the page now.

A. I will find it for you. Yes, 2412.

Q. 2412 and 2413?

A. Yes, 2412 and 2413.

Q. Are you looking at page 25 of Commission's Exhibit 74?

A. Yes, sir, Commission's Exhibit 74.

Q. Now, what is the difference between those two, 2412 and 2413?

A. On one the sink is on the lefthand side and the other the sink is on the righthand side.

Q. Are the products otherwise identical?

A. Otherwise the products are identical.

Q. And is the price the same?

A. The price of the sinks are the same. If you are referring to the sink and cabinet combination then there is a possibility there may be a difference in price. There were two or three different cabinets furnished with those sinks.

Q. What was the reason for the difference in price?

A. In the cabinets?

108 Q. Yes.

A. Well, as I remember, we furnished one cabinet without a drawer and that made it a cheaper cabinet with that same sink.

Q. But otherwise—

A. The sink itself, the cast iron sink, it is the 2412 and 2413, which were identical in price.

Q. Now, could you find in that price book or in that catalogue the catalogue or the description of numbers 6050 and 6051?

A. Yes, sir.

Q. That is on page 4?

A. That is on page 4.

Q. Now, what is the difference between those two numbers, 6050 and 6051?

A. 6050 and 6051 is a steel tub and one is the righthand outlet and the other is a lefthand outlet.

Q. Are they identical other than that?

A. Yes, sir.

Q. Are the prices the same?

A. That is right.

Q. Now, would you look at number 2350 in the Exhibit 74?

A. There is only one thing I would like to call your attention to, Mr. Depro.

Q. Yes?

109 A. This item was not manufactured by Universal-Rundle.

Q. The steel tub was not?

A. That is right.

Q. Do you mean you purchased that from another manufacturer?

A. That is right.

Q. And was that so in 1957?

A. Yes, sir.

Q. Then did you resell that tub?

A. Yes, sir.

Hearing Examiner Buttle: Let the record show that we have reconvened at 9:10 a.m. in Court Room 7, United States Court House, Philadelphia, Pennsylvania, on October 16, 1962.

We will continue with the testimony of the witness, Mr. Backner.

STANLEY S. BACKNER resumed the stand and testified furfher as follows:

Mr. Lipnick: Mr. Examiner, if you please, I am going to resume the examination of the witness with respect to offering for evidence certain documents which were produced by the respondent, and then Mr. Depro will take over the questioning.

Hearing Examiner Buttle: All right.

Direct Examination (Continued).

By Mr. Lipnick:

Q. Mr. Backner, I show you Commission Exhibits for identification 80 through 80-Z-113, and I will ask you if these are invoices from Universal-Rundle Corporation to Harry Arensberg for the year 1957 which were produced by you in response to a subpoena duces tecum.

Mr. Fruchterman: We will stipulate on the invoices, Your Honor.

113 The Witness: They are.

Mr. Fruchterman: Their authenticity, and that they represent sales to the customers indicated on each invoice.

Mr. Lipnick: Well, that is fine. I think we can move very quickly.

Hearing Examiner Buttle: You will stipulate to that, too?

Mr. Lipnick: Well, if the respondents will represent that these invoices are—

Hearing Examiner Buttle: They have said what they will stipulate to. Is that satisfactory to you?

Mr. Lipnick: Not quite, sir.

Hearing Examiner Buttle: Well, do you still have to interrogate the witness despite this stipulation?

Mr. Lipnick: Yes, sir.

Hearing Examiner Buttle: If you do—all right. We will assume that the parties have stipulated as to the authenticity.

By Mr. Lipnick:

Q. Do these invoices represent all of the sales by Universal-Rundle to Harry Arensberg in the calendar year 1957?

A. To the best of my knowledge they do.

Q. Would the same be true with the invoices you
114 have submitted with respect to the other nine customers listed in the subpoena which was served on you?

A. To the best of my knowledge, they are, yes.

Q. Thank you.

Mr. Lipnick: Your Honor, at this point I will offer into evidence Commission Exhibits 80 through 80-Z-113.

Hearing Examiner Buttle: Is there any objection on the grounds of competency or relevancy?

Mr. McAleer: I have an objection, Mr. Buttle. My objection goes to the fact that there has not been a proper foundation laid here with respect to these invoices.

Hearing Examiner Buttle: In what respect?

Mr. McAleer: There is no showing whatsoever that there is any competition here between Arensberg and any other customer of Universal-Rundle Corporation.

Hearing Examiner Buttle: Fine. You are correct. I will receive them subject to connection.

Mr. Lipnick: Fine. Thank you.

Hearing Examiner Buttle: Commission's Exhibits 80-A through 80-Z-113 are received in evidence subject to connection. If connection is not established, you may make a motion to strike.

(The documents heretofore marked for identification as Commission Exhibits 80-A through 80-Z-113 were received in evidence.)

115 By Mr. Lipnick:

Q. Mr. Backner, I show you now Commission Exhibit 80 and I refer you to a box labeled Invoice Number, and the invoice number reads 7-4473-T. Does the initial 7 preceeding the dash in that invoice number refer to the plant location from which the product covered by that invoice was shipped?

A. Yes, it does.

Q. And what is the meaning of the "T" following the invoice number, sir?

A. I haven't the slightest idea.

Q. Does it have any particular significance insofar as—

A. To the best of my knowledge it has no significance.

Q. And the other four digits following the dash are the actual number of the invoice?

A. That is right.

Q. Would that be true?

A. Yes.

Q. Thank you.

Mr. Backner, do you recall yesterday that I asked you a few questions with respect to the designation of certain locations?

A. Yes, sir, I do.

Q. By number?

A. Yes.

Q. Does each location have only one number?

116 A. Only one number.

Q. And does each location have a different number?

A. That is right, for invoicing purposes.

Q. Fine, thank you.

Mr. Lipnick: Your Honor, I have now documents which have been marked for identification as Commission Exhibits 81-A through 81-Z-51. These documents purport to be invoices from Universal-Rundle Corporation to Girard Supply Corporation, and I will now offer these documents into evidence subject to connection in accordance with the previous ruling.

(The documents referred to were marked for identification as Commission Exhibits 80-A thru 81-Z-51.)

Mr. McAleer: No objection.

Hearing Examiner Buttle: No objection. Let me see them.

Well, I know what they are. They are the same as the others, aren't they?

Mr. Lipnick: Yes.

Hearing Examiner Buttle: All right. I will receive in evidence Commissions Exhibits 81-A through 81-Z-51 in—

Mr. Lipnick: Yes, sir.

Hearing Examiner Buttle: —evidence, heretofore 117 marked for identification—

Mr. McAleer: If I could interject—

Hearing Examiner Buttle: —subject to connection.

(The documents heretofore marked for identification as COMMISSION EXHIBITS 81-A thru 81-Z-51 were received in evidence.)

Mr. McAleer: If we could go back to Commission Exhibits—let's go off the record?

Hearing Examiner Buttle: What are we talking about now?

Mr. McAleer: I am talking about Commission Exhibit 80 just introduced in evidence.

Hearing Examiner Buttle: Yes.

Mr. McAleer: May we go off the record, please?

Hearing Examiner Buttle: Yes. All right.

(Discussion off the record.)

Hearing Examiner Buttle: Back on the record.

Mr. Lipnick: Has Commission Exhibits 81-A through 81-Z-51 been received?

Hearing Examiner Buttle: That has been received in evidence subject to connection.

By Mr. Lipnick:

Q. Mr. Backner, as I recall your testimony yesterday, you stated that certain of Universal-Rundle's customers function more as DTU's than as wholesalers and that 118 certain customers function more as wholesalers than as DTU's. Am I correct?

A. That is right.

Q. Am I also correct in thinking that insofar as your dealings with these customers were concerned, all of your customers would be likely to tell you that they were wholesalers?

Mr. McAleer: I object to that.

Hearing Examiner Buttle: Yes. Sustained. How does he know what his customers would be likely to tell him?

Mr. Lipnick: Because, your Honor, the witness testified yesterday that DTU'S like to think of themselves as wholesalers and that the DTU's claimed to be wholesalers because it created more prestige for them.

Hearing Examiner Buttle: Yes, and I will draw the inference that should be drawn. Objection sustained.

By Mr. Lipnick:

Q. Mr. Backner, did you also state yesterday, and if you did not so state, is it true, that the purchasing habits

insofar as buying from Universal-Rundle Corporation are concerned, are different for DTU'S than for wholesalers?

A. No, sir.

Mr. McAleer: I object. I think the record is clear on what Mr. Backner testified to in that respect. This is direct examination. It is not cross-examination. The record is
119 very clear with respect to what Mr. Backner testified.

Hearing Examiner Buttle: You are asking for a conclusion.

Read the question again.

Mr. Lipnick: I will withdraw it, your Honor.

Hearing Examiner Buttle: All right.

By Mr. Lipnick:

Q. Mr. Backner, is it true that a DTU will generally buy less expensive merchandise than a wholesaler?

Mr. McAleer: I object. I don't know what he means by less expensive merchandise.

Mr. Lipnick: Oh, I think this term has a perfectly clear meaning, your Honor.

Hearing Examiner Buttle: Yes.

Mr. McAleer: Is he talking about trim, Mr. Buttle?

Hearing Examiner Buttle: You mean with regard to the same type of product? No, I think Mr. McAleer is right about that. I see what you are trying to ask the witness and I will allow you to ask the witness the question you want to, but there is a point to what Mr. McAleer says. I will sustain the objection.

Mr. Lipnick: I will rephrase the question.

By Mr. Lipnick:

Q. Mr. Backner, with respect to bathtubs, they do
120 come in sizes and types, do they not?

A. They do.

Q. With respect to sizes and types of bathtubs, in some

instances did Universal-Rundle make more than one price bathtub of the same size and of the same type?

A. I am afraid I can't answer that question, Mr. Lipnick. The same bathtub was sold at different prices? Is that what you mean?

Q. No. No. That is not what I mean. What I am speaking of is this: the sizes of bathtubs are generally—is it four and a half, five?

A. The common tub is a five-foot. Five-foot recessed tub. That is a standard tub.

Q. Then there is a four and a half?

A. A four and a half which is more expensive.

Q. And a five and a half?

A. Five and a half which is more expensive.

Q. Is there a six-foot tub?

A. Some people make a six-foot tub. We do not.

Q. Are those the only three sizes you make?

A. Four and a half, five, and five and a half foot in length. We also make a 14-inch high tub and 16-inch high tub. We make a 14-inch high tub in two different widths.

Q. I understand that, too.

Hearing Examiner Buttle: Are you trying to ask
121 him whether he makes identically the same tub in different qualities?

Mr. Lipnick: No, I am not.

By Mr. Lipnick:

Q. Mr. Backner, are there also two types of tubs, a corner tub and recessed tub?

A. That's right.

Q. Are there any other types of tubs?

A. Steel tubs.

Q. Excluding steel tubs.

A. Yes. That pretty well covers it.

Q. With respect to the five-foot corner tubs, in 1957 did

Universal-Rundle make five-foot corner tubs under more than one factory number?

A. Yes.

Q. Did they make five-foot recessed tubs under more than one factory number?

A. Yes, sir.

Q. And what about—

A. Again I hope—I want to be clear on this. When you are talking about a factory number, you are talking about the factory location?

A. No, No. I am speaking, when you put out your wholesaler price book or catalog, would you have one five-foot corner tub listed or would you have two different 122 five-foot corner tubs listed?

A. We would have two different five-foot corner tubs listed. On right-hand side and one left-hand side.

Q. Excluding the fact that there would be that difference, would there be one or two?

A. Excluding the rights and lefts, there would be only one.

Q. Would the same be true of five-foot recessed tubs?

A. For the five-foot recessed 16-inch high tub, there would only be one.

Q. I am not asking you anything, Mr. Backner, other than five-foot recessed tubs.

A. 16 inches high.

Q. No. I am not asking anything about height.

A. Well, we make three five-foot recessed tubs.

Q. That is my question. Did you make—

Hearing Examiner Buttle: Then ask him that. He makes three five-foot recessed tubs. Proceed from there.

Mr. McAleer: What is the question that he asked that has been—

Hearing Examiner Buttle: Well, as I—

Mr. Lipnick: The question I asked him—

Hearing Examiner Buttle: As I understand it now, the witness—let's not waste any time arguing this point. The witness has volunteered an answer whereby they make
123 three five-foot recessed tubs. So go on from there.

Mr. Lipnick: Thank you, sir.

Hearing Examiner Buttle: Don't argue with the witness. Just proceed from there.

By Mr. Lipnick:

Q. How many five-foot corner tubs do you make?

A. One. Again excluding rights and lefts. Excluding rights and lefts.

Q. In all of these questions I am excluding rights and lefts.

What about four and a half foot corner tubs? How many?

A. There are no four and a half foot corner tubs.

Q. How many four and a half foot recessed tubs?

A. One.

Q. How many five and a half corner tubs?

A. No five and a half.

Q. How many five and a half foot recessed tubs?

A. One.

Q. Thank you. Were these three five-foot recessed tubs listed in your price books at different prices?

A. Yes.

Q. Now, in connection with purchasing these tubs, would a DTU in your judgment generally buy the less expensive of these tubs?

A. No.

* * * * *

124 Mr. Lipnick: If the Examiner please, I have documents which have been marked for identification as Commission Exhibits 82-A through 82-Z-20. These documents purport to be invoices from Universal-Rundle Cor-

poration to Black and Brown Company, Philadelphia, Pennsylvania, for the year 1957, and these are subject to the same testimony, the same stipulations and the same ruling on admissibility.

(The documents referred to were marked as Commission Exhibits 82-A thru 82-Z-20 for identification.)

Mr. Lipnick: I offer them into evidence at this time.

Mr. McAleer: I have no objection.

Hearing Examiner Buttle: All right. Let me see them. I will receive in evidence Commission Exhibits 82-A thru 82-Z-20 heretofore marked for identification, subject to connection and subject to your motion to strike in the event connection is not established.

Mr. Lipnick: Yes.

125 (The documents heretofore marked as COMMISSION EXHIBITS 82A thru 82-Z-20 for identification were received in evidence.)

Mr. Lipnick: Mr. Examiner, I now have Commission Exhibits 83-A thru 83-Z-169 which purport to be invoices from Universal-Rundle Corporation to Henry Supply Corporation.

(The documents referred to were marked as Commission Exhibits 83-A thru 83-Z-169 for identification.)

Mr. Lipnick: I offer those on the same basis on which the others have been received.

Mr. McAleer: I have no objections, subject to the connection.

Hearing Examiner Buttle: I will receive Commission Exhibits 83-A thru 83-Z-169 in evidence subject to connection.

(The documents heretofore marked as COMMISSION EXHIBITS 83-A thru 83-Z-169 for identification were received in evidence.)

Mr. Lipnick: Mr. Examiner, I now have Commission Exhibits 84-A thru 84-Z-122 which purport to be invoices

from Universal-Rundle Corporation to Central Supply Company, which I now offer into evidence on the same basis as the others.

They have been marked.

126 (The documents referred to were marked Commission Exhibits 84-A thru 84-Z-122 for identification.)

Mr. McAleer: I have no objection, subject to the same conditions.

Hearing Examiner Buttle: All right. Commission Exhibits 84-A thru 84-Z-122 are received in evidence subject to connection.

(The documents heretofore marked as COMMISSION EXHIBITS 84-A thru 84-Z-122 for identification were received in evidence.)

Mr. Lipnick: Mr. Examiner, I now have Commission Exhibits 85-A thru 85-Z-145 which purport to be invoices from Universal-Rundle Corporation to Mars Supply Company.

(The documents referred to were marked Commission Exhibits 85-A thru 85-Z-145 for identification.)

Mr. Lipnick: I offer these into evidence on the same basis as the others.

Mr. McAleer: I have no objection, Mr. Buttle.

Hearing Examiner Buttle: All right. I will receive in evidence Commission Exhibits 85-A through 85-Z-145 subject to connection.

Mr. McAleer: Yes.

Mr. Lipnick: Thank you.

127 (The documents heretofore marked as COMMISSION EXHIBITS 85-A thru 85-Z-145 for identification were received in evidence.)

Hearing Examiner Buttle: I assume when you say purport to be invoices you mean they are invoices since that is what you were offering. You used the terminology purport to be when—

Mr. Lipnick: I used the term "purport to be" only because they are not in evidence yet.

Hearing Examiner Buttle: As a matter of fact, you can state that they are invoices. You only used the term "purport to be" when you are showing them to the witness and the witness will say they are invoices.

Mr. Lipnick: Thank you.

Hearing Examiner Buttle: So use that language just as I said. Say that they are invoices.

All right. I will receive Commission Exhibits 85-A thru 85-Z-145 in evidence subject to connection.

Mr. Lipnick: Mr. Examiner, I now offer Commission Exhibits 86-A thru 86-Z-22 which are invoices from Universal-Rundle Corporation to Hajoca Corporation.

(The documents referred to were marked Commission Exhibits 86-A thru 86-Z-22 for identification.)

Mr. McAleer: I have no objections, Mr. Buttle, 128 subject to connection.

Hearing Examiner Buttle: All right. Exhibits 86-A thru 86-Z-22 are received in evidence as Commission exhibits subject to connection.

(The documents heretofore marked as COMMISSION EXHIBITS 86-A thru 86-Z-22 for identification were received in evidence.)

Mr. Lipnick: Mr. Examiner, I now offer into evidence Commission Exhibits 87-A thru 87-Z-9 which are invoices from Universal-Rundle Corporation to Richmond Plumbing.

(The documents referred to were marked Commission Exhibits 87-A thru 87-Z-9 for identification.)

Mr. McAleer: No objection, Mr. Buttle.

Hearing Examiner Buttle: All right. Commission Exhibits 87-A thru 87-Z-9 heretofore marked for identification are received in evidence subject to connection.

(The documents referred to were heretofore marked

COMMISSION EXHIBITS 87-A thru 87-Z-9 and received in evidence.)

Mr. Lipnick: Mr. Examiner, I now offer Commission Exhibits 88-A thru 88-Z-15 which are invoices from Universal-Rundle Corporation to Camden Plumbing Supply Company, the same as the others.

129 (The documents referred to were marked Commission Exhibits 88-A thru 88-Z-15 for identification.)

Mr. McAleer: No objection.

Hearing Examiner Buttle: I will receive Commission Exhibits 88-A through 88-Z-15 in evidence as Commission exhibits subject to connection.

(The documents heretofore marked as COMMISSION EXHIBITS 88-A thru 88-Z-15 for identification were received in evidence.)

Mr. Lipnick: Mr. Examiner, I will now offer Commission Exhibits 89-A thru 89-Z-14 which are invoices from Universal-Rundle Corporation to Nat Friedman's Sons.

(The documents referred to were marked Commission Exhibits 89-A thru 89-Z-14 for identification.)

Mr. McAleer: No objection.

Hearing Examiner Buttle: I will receive in evidence Commission Exhibits 89-A thru 89-Z-14 subject to connection.

(The documents heretofore marked as COMMISSION EXHIBITS 89-A thru 89-Z-14 for identification were received in evidence.)

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134 Q. They—the products that come into the Philadelphia-Camden area, where do they originate from?

A. They may originate—you are talking about 1957, I presume?

135 Q. 1957.

A. In 1957 the cast iron may have originated in Milwaukee, Wisconsin, or in Camden, New Jersey. The

vitreous china may have originated in New Castle, Pennsylvania, or Camden, New Jersey.

Q. I noticed in the exhibits for the Mars Company—perhaps you remember this. If you don't, I will let you take a look at them, Mr. Backner—that some shipments were made to Mars at an address in Philadelphia and were dropped off at Mars on Black Horse Pike in New Jersey. Do you recall that? I will let you look at it if you don't.

A. I don't recall that Mars had a plant at Black Horse Pike, New Jersey, but it is very possible they did.

Q. I am looking at 85(e). I ask you to look at 85(e) and ask you if that illustrates a sale to Mars of Philadelphia with a drop shipment at a New Jersey point. Would that be the meaning of that document?

A. I would say so, yes. Apparently they had a branch there at that time, although I have no recollection of the branch, Mr. Depro.

Q. Could you tell from that document where the products were shipped from?

A. I would presume they were shipped from the Camden cast iron plant.

136 Mr. McAleer: I move to strike the answer, Mr. Buttle.

Hearing Examiner Buttle: The answer may be stricken with regard to the witness' presumption.

Can you state with a reasonable degree of certainty whether they are?

The Witness: I can state with a reasonable degree of certainty they were shipped from the Camden cast iron company.

By Mr. Depro:

Q. Well, now, let me ask you with respect to 85(d). Can you tell me with reasonable certainty where the products there were shipped from?

Mr. McAleer: Your Honor, I think before Mr. Backner

answers that question we should examine 85(d) and you will note that on the invoice it states that it is a "Will Call". So the products were not shipped by Universal-Rundle to any location.

Hearing Examiner: Yes. What about that?

The Witness: This was picked up at the cast iron plant. It wasn't shipped.

By Mr. Depro:

Q. Well, now, how about 85(h)? Where was the product shipped from on that?

A. From the Camden cast iron plant.

Q. From Camden to Mars in Philadelphia?

137 A. Yes, that is right.

• • • • •

145 Q. Yesterday you mentioned the term "project". I would like to ask you with respect to project if price is a very important element in that sale?

A. Very.

Q. Would you say it is the most important?

A. No.

Mr. McAleer: I object. It calls for a conclusion by the witness.

Hearing Examiner Buttle: Yes. Objection sustained.

By Mr. Depro:

Q. Mr. Backner, would you say that it is true that all of the major manufacturers of plumbing fixtures market substantially similar items?

Mr. McAleer: I object, Your Honor.

Hearing Examiner Buttle: All of what?

Mr. Depro: The major manufacturers of plumbing
146 fixtures market substantially similar items. In other words, do they all manufacture tubs and do they all manufacture lavatories, and so forth?

Hearing Examiner Buttle: Is there an objection?

Mr. McAleer: Yes, sir, there is an objection. I suggest that if he is going into the question of competing manufacturers with Universal-Rundle, and he wants to know what products these manufacturers may sell in competition with Universal-Rundle, that he ask it on a per product basis.

Hearing Examiner Buttle: I think you should develop what the competition is, first.

Mr. Depro: Well—

Hearing Examiner Buttle: And the product line. The product line and—

Mr. McAleer: That is what I mean, Mr. Buttle. The product line.

By Mr. Depro:

Q. Mr. Backner, does the Universal-Rundle Corporation maintain any survey or have a survey made or surveys made to determine the position in the industry, in the plumbing fixtures, bathroom, kitchen fixtures industry, the position of Universal-Rundle in that industry?

A. Yes.

Q. What position was Universal-Rundle occupying in that industry in 1957?

147 Hearing Examiner Buttle: Wait a minute. Don't answer that because when you say position, are you talking about gross sales? Are you talking about unit sales, or what do you mean?

Mr. Depro: I would ask along the basis of volume of sales.

Mr. McAleer: Is he talking dollar-wise?

Hearing Examiner Buttle: Talking about dollar buying volume or unit volume?

Mr. Depro: Dollar volume, I am talking about. The dollar sales. I assumed that he would—

By Mr. Depro:

Q. Do you maintain or did your survey—did you make a survey on that basis?

A. Yes, we do, Mr. Depro.

Q. Approximately what—

Hearing Examiner Buttle: Did you make a study as to the comparative unit volume sales insofar as your customers are concerned, and dollar volume of—

The Witness: Yes, sir.

Hearing Examiner Buttle: —dollar volume of sales also?

The Witness: Yes, we do.

Hearing Examiner Buttle: Both.

By Mr. Depro:

148 Q. Could you give us a position on both bases?

A. Yes, I could. Now, of course—

Hearing Examiner Buttle: Fix the time.

Mr. Depro: 1957.

The Witness: I realize it is a matter of public record but this is a trade secret, Mr. Examiner. I just wonder, in view of other people being present, whether I have to answer it publicly.

Mr. Depro: I don't understand that the position of a company in the trade is a trade secret.

Hearing Examiner Buttle: As a matter of fact, that is no trade secret because certainly your position is determinable insofar as dollar volume is concerned by any member of the public. All they have to do is get the financial statements of companies whose securities are marketed on the New York or other stock exchange and ascertain it.

Mr. Fruchterman: May we approach the bench?

Hearing Examiner Buttle: Yes. All right.

Mr. Fruchterman: Can we go off the record?

Hearing Examiner Buttle: Yes.

(Discussion off the record.)

Hearing Examiner Buttle: I am sustaining Mr. McAleer's objection on the grounds that the question calls for a conclusion, although I do not consider it a con-
149 fidential matter.

By Mr. Depro:

Q. Mr. Backner, could you tell us from your experience in the industry and from any surveys that you have made of the competitive picture what company among the producers, the manufacturers of plumbing fixtures, the same products that your company makes or similar products, is the largest company in point of volume of sales?

A. American Radiator and Standard Sanitary. They manufacture approximately 40 per cent of the cast iron fixtures and approximately 24 per cent of the vitreous china fixtures manufactured in this country.

Q. Did they occupy about that same—

Hearing Examiner Buttle: Wait a minute. You say they do. I say when.

Mr. Depro: That is what I was going to ask.

Hearing Examiner Buttle: In 1957?

The Witness: I would say they occupied the same position in 1957.

By Mr. Depro:

Q. In 1957. And did the Universal-Rundle Corporation compete with that American Standard in the Philadelphia-Camden area in 1957?

A. Yes, sir.

* * * * *

151 By Mr. Depro:

Q. Mr. Backner, the American Standard sold their products, their bathroom products and fixtures in the Philadelphia-Camden area in 1957?

A. They did, sir.

Q. And did the Crane Company also sell in that area at that time?

A. Yes, sir.

Q. And did Briggs also sell there?

A. Yes.

Q. In the Philadelphia area?

A. Yes.

Q. Kohler?

A. Yes, sir.

Q. Murray-Eljer?

A. Yes, sir.

Q. Was Richmond Radiator there also?

A. Yes, sir.

Q. Now, do you know—

Hearing Examiner Buttle: Did they sell what products?

By Mr. Depro:

Q. Did they sell bathroom fixtures?

152 A. They sold bathroom fixtures. Briggs did not sell cast iron fixtures; they have steel fixtures only.

Q. Did they sell kitchen sinks in that area?

A. Again, the exception was Briggs.

Q. With the exception of Briggs?

A. With the exception of Briggs; yes.

Hearing Examiner Buttle: Did they sell essentially the same kind of fixtures that Universal-Rundle sold?

The Witness: Yes, sir.

Hearing Examiner Buttle: And did they include—Now, you can enumerate the fixtures.

By Mr. Depro:

Q. Well, did they include the lavatories? That would be in the bathroom fixtures?

A. That is right.

Q. When you referred to bathroom fixtures, what would you include in that term?

A. Tubs, water closets and lavatories and bidets.

Q. What is that?

A. B-i-d-e-t-s. That is a local bath fixture.

Q. In your experience in the business, which of these companies would have been second to the American Standard, if you know, in the year 1957 in the volume of sales?

A. The Kohler Company.

153 Q. And do you have any basis for determining what the next company was?

A. Yes, I believe in 1957 Crane was the third company.

Q. Crane?

A. Yes.

Q. Can you tell what position in the survey the Universal-Rundle Company occupied in that year?

A. Yes, I believe we were either 4th or 5th.

Q. Either 4th or 5th?

A. Uhuh.

Q. Who was the other company?

A. Eljer.

Q. So you have named American Standard, Kohler, Crane and either Eljer or Universal-Rundle as the first five?

A. That is right.

Q. Are they all in the business today?

A. Yes, sir, they are.

Q. Now, do you know whether these other companies sell the bathroom fixtures without the fittings, as you have described Universal-Rundle sells them?

A. Yes, they sell them identical as we sell them.

Q. Is that customary?

A. However, they all manufacture fittings, you un-
154 derstand?

Q. Yes, sir.

A. Yes.

Mr. Depro: Mr. Examiner, I believe that is all the questions I want to ask this witness.

* * * * * *

163 *Cross-Examination by Mr. Fruchterman.*

* * * * * *

168 Q. Mr. Backner, are you familiar with the physical dimensions of the various fixtures sold to the trade by Universay-Rundle during 1957?

* * * * * *

169 The Witness: Yes, I am.

By Mr. Fruchterman:

Q. Are there any standard dimensions in the industry for various fixtures such as tubs?

A. Yes, there are.

Q. Are there standard dimensions in the industry for such fixtures as lavatories in cast iron?

A. Yes, there are.

Q. Would your answer be the same for lavatories in vitreous china?

A. Yes.

Q. Would you specify what the standard dimensions are in the rade or through the industry generally rather for bath tubs with regard to height, that is the distance from the floor to the top of the tub?

A. The industry commercial standard specifies 16 inches and 14 inches.

* * * * * *

173 Q. I now direct your attention to Commission's Exhibit Number 74 and Respondent's Exhibit Number 3; and I direct your attention to the bath tub pictured on Commission's Exhibit Number 74 and I ask you, sir, if that style tub is known by any name in the industry?

A. Yes, that is known as the Pembroke Tub.

Q. Where is that name "Pembroke" derived from?

A. It is derived from American Standard Pembroke Tub. It is a standard design in the industry.

176 Hearing Examiner Buttle: Well, do you know all of the designs that are manufactured and sold in the Philadelphia-Camden area?

The Witness: Yes, sir, I do.

Q. I direct your attention now to Commission's Exhibit Number 74 and specifically to the bath tub portrayed
177 on the front cover of Commission's Exhibit Number 74, and I ask you if any manufacturers of cast iron other than Universal-Rundle employed a design similar to that during 1957?

A. The majority of the manufacturers employed that design in 1957.

Q. Is that the design you referred to as the Pembroke design?

A. It is the Pembroke design.

188 The Witness: May I explain something?

Hearing Examiner Buttle: Yes, you may.

The Witness: Plumbing fixture manufacturers as a whole pertaining to bath tubs followed a certain specified design. That was originated by American Standard and it is called the Pembroke design.

Hearing Examiner Buttle: That is what I was trying to get out of you when you said the Universal-Rundle line. I was trying to think of Pembroke.

The Witness: The Universal-Rundle line incorporated that Pembroke design. So does American Standard and Elger and others. In other words, this is the Universal line.

Hearing Examiner Buttle: When you say and others, are all of your competitors or all of those selling in the same trade area that you are selling, do they incorporate the Pembroke design?

The Witness: That is right. The Pembroke design is very, very similar to it.

Hearing Examiner Buttle: Very similar to it?

The Witness: Yes, sir.

Hearing Examiner Buttle: But they all do?

The Witness: Yes, sir.

190 Q. Mr. Backner, I again direct your attention to Respondent's Exhibits for identification 4-A through 8-B. Would you look at the designs depicted on those documents and then state whether or not in your opinion those designs depicted thereon are typical of all the designs competing manufacturers offered for sale through their trade customers in the Camden-Philadelphia area in 1957?

A. Yes, they are.

191 Hearing Examiner Buttle: Let the record show that we have reconvened at 1:35 p.m. in the matter of Universal-Rundle Corporation, Docket No. 8070, in Court Room 7, United States Court House, Philadelphia, Pennsylvania.

We will proceed with the cross-examination by Mr. Fruchterman.

STANLEY S. BACKNER resumed the stand and testified further as follows:

Cross-Examination (Continued) by Mr. Fruchterman.

* * * * *

200 Q. Mr. Backner, in describing the soap dish feature of the U-R trade tub to wholesaler purchasers of that product, how do you present the case for this feature of the product? What do you tell them?

A. I tell them that it is a very desirable feature because we have had instances where builders have saved $5 in the installation of bathtubs because they did not have to put a recessed soap dish in the wall.

* * * * *

206 Q. Mr. Backner, on direct examination you were asked to name your competitors in the Camden-Philadelphia area. I noticed you omitted the name of Case. Are they a competitor in this area?

* * * * *

207 Q. Do they sell plumbing fixtures in this area?

Hearing Examiner Buttle: I will allow that.

The Witness: Yes, they do.

By Mr. Fruchterman:

Q. Was your omission inadvertent?

A. It was inadvertent. I named, I think, about 20 or 25 competitors and that is one I left out. I may have omitted some others.

* * * * *

208 *Redirect Examination by Mr. Lipnick.*

Q. Mr. Backner, I have just briefly—are the designs of a bathtub to your knowledge or the designs used by Universal-Rundle in making its own tub—Universal-Rundle's

branded tubs and the making of the Sears tubs—are those designs patented or copyrighted in any way?

A. No, sir. Let me qualify that. I know the Universal-Rundle design is not copyrighted or patented. I don't know whether Sears' is but I do not believe it is.

Q. If it is, you don't know about it.

A. That is right.

Q. Do you know whether or not the designs used by other manufacturers in making their bathtubs are copyrighted or patented?

A. To the best of my knowledge, no.

Q. That is, to the best of your knowledge they are not copyrighted or patented.

209 A. That is right.

Q. Do you know whether the so-called Pembroke design is copyrighted or patented by anyone in any way?

A. No, it isn't.

Q. Now, when you testified on cross-examination with respect to the relative volume of sales, I think you compared five-foot recessed tubs on the one hand with all other tubs on the other.

A. That is right.

Q. Did you have reference to all tubs manufactured by Universal-Rundle or were you referring only to cast iron tubs?

A. I was referring only to cast iron tubs because Universal-Rundle only manufactures cast iron tubs.

Q. Does Universal-Rundle sell tubs made of any material other than cast iron?

A. Yes.

Q. Did they sell—would that be steel?

A. That is steel.

Q. Did they sell steel tubs in 1957?

A. Yes.

Q. In 1957, sir, did you make a four and a half foot steel tub or did you sell one, rather?

A. No, sir.

Q. Did you sell a five-foot steel tub?

210 A. Yes, sir.

Q. Any other size steel tubs?

A. No, sir.

Q. Was that a recessed tub?

A. That was a recessed tub.

Q. In your opinion, sir, would you say that one of the reasons for what appears to you to be the—or for what you have testified, is the popularity of the five-foot recessed tub, would you say that one factor explaining that is the fact that in multiple unit construction, the so-called building projects, that that tub is the tub which is usually used?

A. Yes.

Q. Then would it be correct for me to assume that a substantial number of your sales of five-foot recessed tubs are sold to projects and are sold by your customers on the basis of competitive bidding for which you give them special quotations?

A. Yes.

Q. Would it also be safe for me to assume that your sales of all other sizes and types of tubs such as those sales may be are substantially not made for projects?

Mr. McAleer: I object. I can't understand the question, Mr. Buttle.

Mr. Lipnick: I will rephrase it.

211 Hearing Examiner Buttle: Well, yes. Rephrase the question.

By Mr. Lipnick:

Q. To what extent are sizes and types of tubs other than five-foot recessed tubs used in building projects?

A. Only to the extent where a special situation is involved where there isn't room enough to install a five-foot recessed tub or where the particular recess is larger than five-foot so that they can install a five and a half or six-foot tub.

Q. Directing your attention to 1957 and to the practice of Universal-Rundle of giving special quotations to enable its customers to bid for sales to these projects, would you please give me your best estimate of the relation of five-foot recessed tubs on which you gave quotations for projects as opposed to all other tubs on which you gave quotations for projects?

A. I couldn't give you an estimate, Mr. Lipnick. I would say that it was very nearly 100 per cent because again, anyone building a house builds a house for a five-foot recessed tub.

Q. Fine. Now, let me ask you this question, Mr. Backer. Would you give me your best estimate of your sales of bathtubs in 1957 divided—that is, just the Universal-Rundle tubs, now, excluding Sears, your sales of Universal-
212 Rundle bathtubs—would you give us the relative percentages of your sales which were made under special project quotations and those which were not?

Mr. McAleer: I object. I don't know what particular area Mr. Lipnick is referring to. I don't know whether he is talking in terms of national distribution of tubs or whether he is talking about the Philadelphia-Camden area. I think he should be a little more specific in his questions.

Hearing Examiner Buttle: Well, in the first place the questions are directed to the Camden-Philadelphia area, is that right?

Mr. Lipnick: Surely.

Hearing Examiner Buttle: Directed to 1957.

Mr. Lipnick: Certainly.

Hearing Examiner Buttle: And, of course, the first question is do you compile such percentages on marketing?

The Witness: No, sir.

By Mr. Lipnick:

Q. In your capacity—

A. I could save you a lot of trouble. I couldn't answer the question. I mean, I don't know the answer. I know that the percentage would be about the same as the national percentage.

213 Q. Well—

A. It would be very small.

Q. What was the national percentage?

A. The national percentage as I told you on five-foot regular standard tubs against the four and a half to five—

Q. No, no. That wasn't my question, sir. I think you misunderstood me.

A. All right. I am lost.

Q. I am sorry. Let me repeat it. I am directing your attention to the Philadelphia-Camden area and to the year 1957, and my question is whether you can give us, or whether you would be good enough to give us, your best estimate of the percentage of tubs sold by Universal-Rundle under special project quotations as compared to the percentage of tubs which were sold in other matters by your regular ordering procedures which did not involve a special project quotation.

A. I can't answer it.

Mr. Fruchterman: Objection, your Honor.

Hearing Examiner Buttle: He says he doesn't know.

The Witness: I can't answer the question.

Hearing Examiner Buttle: It is settled.

By Mr. Lipnick:

Q. For the year 1957 did you compile any information on a formal or informal basis which would indicate the

214 business which Universal-Rundle did in selling building projects as opposed—

Mr. Fruchterman: We object, your Honor, to this line of questioning.

Hearing Examiner Buttle: He hasn't even finished the question.

Mr. Fruchterman: But the whole line of questioning, your Honor. If we are going to be held on cross-examination to the direct examination, then certainly he should be held to the cross-examination on his redirect. That is the rule.

Hearing Examiner Buttle: Well, as a matter of fact, he can ask any questions, that will explain what you went into and these happen to be matters that you went into. You were the one that was bringing out these comparisons. Now he is going into them. Objection overruled.

The Witness: I can save a lot of trouble on that. There are no statistics available to determine the percentage of bathtubs going into new construction and the percentage going into remodeling and repairing.

By Mr. Lipnick:

Q. Well, did you in your capacity as senior marketing official of Universal-Rundle Corporation, and as the official of that company who I assume exercised general supervision over the entire marketing operations of the Uni-
215 versal-Rundle line, did you either formally or informally make it a point to be informed as to how much of Universal-Rundle's business was being done under special project quotations? Did you pay any attention to that at all?

A. No. Not for the Philadelphia-Camden area, Mr. Lipnick.

Q. Well, did you do it on any other basis?

A. Nationally, yes.

Q. Could you give us an approximation of what it was nationally?

Mr. McAleer: I object, your Honor.

Mr. Lipnick: I withdraw the question temporarily.

Hearing Examiner Buttle: All right.

By Mr. Lipnick:

Q. Would you expect that the figures for the Philadelphia-Camden area would be reasonably reflected by the national average?

A. No, I would not, Mr. Lipnick.

Q. Would you expect that they would be substantially different?

A. Yes. I give—

Mr. McAleer: I object.

Mr. Lipnick: That is all.

Hearing Examiner Buttle: That is all. Now—

Mr. Lipnick: I have no further questions at this time.

* * * * *

221 HENRY SCHREIBSTEIN was thereupon called as a witness for the Commission and, having first been duly sworn, testified as follows:

Hearing Examiner Buttle: Give your name and address to the Reporter, please.

The Witness: My name is Henry Schreibstein. I live at 459 Loucroft Road, in Haddonfield, New Jersey.

Direct Examination by Mr. Depro.

Q. Mr. Schreibstein, what is your business?

A. I am in the business of selling plumbing, heating, roofing and various buildings materials.

Q. And what is the name of your business?

A. Henry Supply Company.

222 Q. Is that a partnership, proprietorship, or—

A. Partnership.

Q. And who are the others?

A. Just my wife and myself.

Q. You and your wife. Where is the location of Henry Supply Company?

A. We are at 440-442 Caighn Avenue, Camden, New Jersey.

Q. How long have you been in business under the name Henry Supply Company?

A. Since 1936.

Q. Have you been located in Camden all that time?

A. All that time at the same spot.

Q. Have you in the course of your business purchased plumbing fixtures, bathtubs and the like, from Universal-Rundle?

A. I did.

Q. Did you purchase in 1957?

A. I did.

Q. Now, to whom do you sell your products, Mr. Schreibstein?

A. Well, I sell to two types of people. I sell to plumbers, and I sell to home owners.

Q. Are you able to estimate percentage-wise the amount of sales, volume of sales, to each one of these two classes for 1957?

A. I can tell you that my sales to the mechanics
223 run about 75 per cent of my volume.

Q. That is to the plumbers?

A. To the plumbers, yes.

Q. I see. Now, to whom—with whom do you compete in the sale of plumbing fixtures?

Mr. McAleer: I object, your Honor. He is asking for a conclusion. I think he can get that out by more direct questioning.

Hearing Examiner Buttle: What is the question? Read the question.

(The Reporter read the question as follows:

"Question: I see. Now, to whom—with whom do you compete in the sale of plumbing fixtures?")

Hearing Examiner Buttle: Yes. Objection sustained. You can rephrase the question.

Do you sell fixtures?

The Witness: Yes, sir.

Hearing Examiner Buttle: As you have described them, in the Philadelphia-Camden area?

The Witness: Well, mostly in Camden. I do very little business in Philadelphia. It is all in Jersey.

Hearing Examiner Buttle: And do others sell besides you the same kinds in the area in which you sell?

The Witness: Yes, sir.

Hearing Examiner Buttle: Who are they?

224 The Witness: They are—do you want them by name?

By Mr. Depro:

Q. Yes.

A. Well, on my street alone is the Central Supply Company. There is Harry Arensberg. David Arensberg who operates the Caighn Avenue Plumbing Supply. There is the Camden Plumbing Supply also on my street. Sears, Roebuck & Company, of course. Then there is J. D. Johnson, the Mott Company of Pennsylvania, which has a branch in Camden, Hajoca Corporation, and I can go on and on, Mr. Examiner, if you want me to.

Q. There are others besides those that you mentioned?

A. Many more in the outlying districts. I only gave you those that are close to me in Camden.

Q. And do you know whether these companies that you have named resell to plumbers and consumers?

Mr. McAleer: I object, your Honor.

Mr. Depro: I asked him if he knows. If he doesn't know—

The Witness: I do know.

Hearing Examiner Buttle: How do you know?

The Witness: They sell to both.

Hearing Examiner Buttle: How do you know?

The Witness: I have either lost sales to them or
225 taken sales from them, from both types of customers, from either plumbers or consumers. If you want me to go into detail, I will explain, sir.

Mr. Depro: Well, that is enough for right now, unless you want him to go into detail, Mr. Examiner.

By Mr. Depro:

Q. Now, have you ever sold to—strike that.

Do you know what a project is, Mr. Schreibstein?

A. Yes, sir.

Q. In the plumbing business?

A. Yes.

Q. Would you tell us what that is?

A. A project is either a development of a large number of homes or a large apartment house or hotel or motel. That is what we call a project.

Q. Now, do you make sales for projects?

A. No, I do not cater to them, sir.

* * * * * *

226 By Mr. Depro:

Q. Will you describe, Mr. Schreibstein, your efforts
227 in endeavoring to resell the products that you purchase from Universal-Rundle, for example.

A. Do you want me to describe my efforts?

Q. Yes, and the nature of the operations of your business in endeavoring to resell these products.

A. Well, my particular business, and I assume that you

gentlemen are interested in the plumbing end of it only, has a two-fold nature. There is a class of customer who wants the finest of merchandise, good quality, and they are willing to pay for it, and then we have a class of people who want the cheapest thing that they can get regardless of quality.

For instance, they bought a property and they want to put a bathroom in it and it is an investment and they want to get away with as small an investment as possible. They will come in and get my price on whatever it is, a three-piece bathroom, and if I am low enough, I will get the sale. And they are not afraid to tell me whether I am high.

Q. Are these—would these be consumers or plumbers?

A. Both. Both consumers or plumbers.

Mr. McAleer: I move to strike the last portion of the answer. I don't know how he can testify with respect to what the plumber knows the consumer wants. It is hearsay evidence.

Hearing Examiner Buttle: Yes. How do you know?

228 The Witness: How do I know what the plumber wants? I didn't understand you, sir.

Hearing Examiner Buttle: Yes. How do you know what the plumber wants?

Mr. McAleer: The plumber's customers, Mr. Buttle.

Hearing Examiner Buttle: How do you know what the plumber's customer wants?

The Witness: I know what the plumber wants and what he has promised the customer because he has told me that he has promised a woman a five-foot pink bathtub with a 19 x 17 basin and washdown toilet outfit, and that is the three pieces that I quote him with or without shower fittings and fittings to the floor. And I quote him accordingly. And if he tells me that my price is high, that he can do better elsewhere, that is it.

Hearing Examiner Buttle: Well, I will receive it, not for

the truth of what was told the witness but in explanation of what he did and said.

By Mr. Depro:

Q. Well, Mr. Schreibstein, what are your duties in connection with your business? Just what do you do in connection with it?

A. I do everything but sweep up.

Q. You are in the store selling?

A. I sell, I buy, I pay the bills and I collect the bills.

229 Q. Do you deal with these customers daily?

A. I personally deal with them from early morning to late at night.

Q. And who do you deal with in the Universal-Rundle Company in the purchasing of those products?

A. Are you talking about today?

Q. Well, now, in 1957.

A. In 1957 I had a salesman that called on me by the name of Quindlan. I would give my orders to him for whatever I needed, or more than likely I would call. You see their plant was in Camden and we had a relationship where I would call their warehouse and talk to a Miss Hollingshead who always took my orders and would have the merchandise ready for my truck when it arrived to pick it up. That is who I dealt with.

Q. Now, did you receive the merchandise in 1957 with fittings or without fittings?

Mr. McAleer: I object. I don't think that the witness—I think Mr. Depro should specify what fixtures he is speaking of when he is talking about fittings.

Hearing Examiner Buttle: Well, I think it would be a good idea to ascertain what this witness understands fittings to be. It has been testified by Mr. Backner as to what he considers fittings are. I think I would obtain the understanding of this witness as to what he considers

230 fittings to be.

By Mr. Depro:

Q. Would you give us your understanding as to what fittings are?

A. Fittings for a bathroom outfit are usually spigots and supply pipes and traps. Universal-Rundle does not sell a complete line of fittings. Some of the items they make have fittings as standard parts, standard equipment. For instance, they make basins with spigots on them. They make other basins that have no faucets. Understand?

Q. Yes.

A. Or they make various numbers. Now, the ones—if I wanted the type where spigots are included, that is what I order. If I want them bare, what we call in the trade bare, I buy them bare.

Q. Do you buy tubs bare?

A. Always.

Q. From Universal-Rundle?

A. Always bare. Bathtubs are always bare. Toilet outfits including fittings inside of the toilet tanks, but they do not include the supply that brings the water to them. Neither do they include the seat excepting in one case the most expensive one. But outside of that, all the rest you buy your own seats elsewhere.

Q. Now, did you in 1957 purchase bathroom fixtures, 231 plumbing supplies of that nature from anyone else other than Universal-Rundle?

A. Yes.

Q. From whom else did you purchase?

A. I had an arrangement with friends of mine in the Philadelphia area from whom I get American Standard and Kohler of Kohler.

Q. Do those two companies make a similar line of products as Universal-Rundle?

A. Comparable. Comparable.

Q. Could you estimate for us, Mr. Schreibstein, with reasonable accuracy the volume of your business in 1957?

Mr. McAleer: Objection. I don't know whether Mr. Depro is talking about his total volume dollar-wise or whether he is talking about—

Hearing Examiner Buttle: Yes. Sustained.

Mr. Depro: I meant dollar-wise. I don't know how I could ask—he has got a lot of products. I am just asking him if he can give an estimate of his toilet sales in dollars for 1957, to get some idea of what the size of his business is.

The Witness: I have approximated around $200,000. A small business.

Mr. McAleer: I move to strike the last answer, Mr. Buttle. A characterization.

232 Hearing Examiner Buttle: Yes. Strike "small business". Or to be exact "a small business".

By Mr. Depro:

Q. Mr. Schreibstein, in dealing with your customers on the floor of your store, do you have any knowledge as to whether they were concerned about the price of the products?

A. Whether my customers were concerned with the price?

Q. Yes.

A. And how.

Q. Did they make comparisons of the prices of your—

A. Yes, they do.

Q. —prices—with others?

A. Yes, they do. In most instances they do.

Q. Was that the case back in 1957 also?

A. Oh, sure.

Q. Now, in the purchase of the products from Universal-Rundle, what products did you purchase most, more than any others? Was there any particular product or products?

A. I would say bathroom outfits. When I say bathroom outfits, that means the bathtub, the toilet outfit and the basin. I think I sold more of them than kitchen sinks which they also manufacture.

237 By Mr. Depro:

Q. Now, Mr. Schreibstein, in addition to the manufacturers of plumbing supplies that you have named, did any others, other manufacturers of plumbing supplies, solicit your business in 1957 that you can recall?

A. I will say no, not in 1957. Prior to that, yes. But not at that time or around that time.

May I add something to that?

Hearing Examiner Buttle: Are you telling us that you sell only Universal-Rundle products?

The Witness: No, I do not. I sell others which 238 I just stated.

Mr. McAleer: He has already testified, Mr. Buttle, that in 1957 he carried American Standard and Kohler of Kohler.

The Witness: Right. Now—

Hearing Examiner Buttle: Does Sears, Roebuck sell in your area?

The Witness: And how. Yes, sir.

Hearing Examiner Buttle: They do.

The Witness: Yes, sir. They have a store not too far from me, a few miles.

By Mr. Depro:

Q. Have you—

Hearing Examiner Buttle: Have you lost any customers to them so far as the sale of tubs is concerned that you know of?

The Witness: On occasion, yes, sir.

Hearing Examiner Buttle: How do you know?

239 The Witness: Customers would come in and tell me at various times that they liked what they saw at Sears, Roebuck better or that they had a better price. As a rule, if you want me to go on further—

Hearing Examiner Buttle: Yes.

The Witness: —as a rule I have no problem with them. But on occasion when they run sales, and give some ridiculous specials, I would lose sales to them. I also, if I may add—

Hearing Examiner Buttle: Did you observe the products that they had for sale?

The Witness: Oh, yes.

Hearing Examiner Buttle: Have you been in the Sears, Roebuck store?

The Witness: I have.

Hearing Examiner Buttle: In your opinion is their product as marketable as the one you are selling?

The Witness: It is.

Hearing Examiner Buttle: In your opinion is it as marketable as the one you are selling at the same price?

The Witness: I would say it is.

* * * * * *

242 By Mr. Depro:

Q. Mr. Schreibstein, what size inventory of these bathroom fixtures would you normally carry?

A. Well, you mean complete plumbing fixtures or—when you say—you mean in the bathroom field?

Q. Yes.

A. Well, due to the closeness of Universal-Rundle's plant, I never have to carry a big inventory. And I approximate my plumbing fixtures that I always stock somewhere around $10,000 worth in that department.

Q. Do you pick up or did you in 1957 pick up your products from Universal-Rundle's plant?

A. I most always did excepting when I bought truckloads, at which time they delivered—

Q. I see.

A. —by common carrier.

Q. Where did they—where were they shipped from, do you recall?

A. From two plants in Camden. They had two
243 plants. One made china products and one made cast iron products. They coordinated the truckload and they gave me—the truckload had to have so many tons and they had a teamster who would deliver to me.

* * * * *

By Mr. Depro:

Q. Mr. Schreibstein, have you had customers come in and inquire about the height of tubs that they wanted to purchase?

A. Yes. Universal-Rundle, or any manufacturer that makes what we call the best tub, it is always 16 inches in height. Now, this new tub that I am vague about the year when it was put out is 14 inches in height.

Q. By Universal-Rundle?

A. Well, all of them make it. All of them make the lighter tub today.

Q. When you say all of them, you mean all the major manufacturers?

A. All the major manufacturers.

Q. I see.

A. But 16 inch was always the best tub. 16 inches high from the floor.

Now, if they started making their lighter grade of tubs before 1957, then I carried them, and they are only 14
244 inches in height in cast iron.

Q. Would you say in your opinion as based upon your experience in this business that a difference of one

inch in height in a tub would cause a purchaser to choose one from the other?

A. Well, we have various reasons for them to purchase the lower tub. Reason number one is price. It is less money.

• • • • •

248 Q. In your business, Mr. Schreibstein, do you make it a practice to take advantage of the cash discounts that all the suppliers offer you?

A. I try as much as the money holds out.

Q. And is that the usual—what is the rate of discounts usually?

A. Usually we buy in the plumbing industry at two per cent, 2/10, net 30, which means that all invoices that you buy in the month of September I have paid on the 10th of
249 October and I am entitled to two per cent cash discount.

Q. Does that constitute an important part of your operations?

A. It certainly does. As a matter of fact, on competitive jobs we take that two per cent into consideration when we quote a price because on a $200 sale, it can mean $4.

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Cross-Examination by Mr. McAleer.

Q. Mr. Schreibstein, when did you first start to purchase Universal-Rundle fixtures?

A. I think I started about 1936 or 1937. Now, I really don't know but it was in that area. Probably a year, maybe two years after I started in business.

Q. When did you stop carrying the Universal-Rundle line of fixtures?

250 A. When did I stop?

Q. Yes, sir.

A. I never stopped.

Q. You are presently carrying Universal-Rundle's line?

A. Yes, sir.

Q. Are you presently buying on a direct basis from Universal-Rundle?

Mr. Depro: I object to that, Mr. Examiner. I didn't go into any of that and I confined it to 1957, but I have no objections to his—

Hearing Examiner Buttle: I will permit this question. Go ahead. Objection overruled.

By Mr. McAleer:

Q. Are you presently buying Universal-Rundle fixtures direct from the factory?

A. No.

Q. What is your source of Universal-Rundle fixtures at the present time?

A. Universal-Rundle sets up what they call super jobbers, and that is who I am buying from.

Q. Would you give me the name of this so-called super jobber?

A. Well, truthfully I only buy from one of them. It is called Material Distributors in Philadelphia.

Q. Could you estimate for me your volume of pur-
251 chases in Universal-Rundle fixtures during the past year dollar-wise?

* * * * *

254 Mr. McAleer: Would you read the question back, Miss Reporter?

(The Reporter read the question as follows: "Question: Could you estimate for me your volume in purchases in Universal-Rundle fixtures during the past year, dollar-wise?")

The Witness: I would say approximately $20,000.

* * * * *

Q. I will phrase it this way, Mr. Schreibstein: do you know whether Sears, Roebuck sells directly to plumbers?

255 A. I have had plumbers tell me they can go to Sears and buy a bathroom like mine. Sometimes they like—maybe Sears had an advertisement in the paper, a certain special, and they went there to buy it and I didn't have it in stock, the item that they wanted. I know that plumbers do go there on occasion.

Q. Is that a rare occasion as far as plumbers telling you that they have gone to Sears, Roebuck?

A. I don't think plumbers make a regular diet of going to Sears, Roebuck, no.

* * * * *

By Mr. McAleer:

Q. When you sell direct to a consumer, Mr. Schreibstein, would you explain to me how the plumbing—how you arrange for the installment of those plumbing fixtures?

A. Well, when I sell to the consumer, in most cases I make no arrangements for installation. You must understand that I have the whole southern part of New Jersey to sell to, and the big majority of them will either install
256 it themselves or get a local plumber to do the installation or relative. It is a rare occasion when I make provisions for an installation, very rare.

Q. Then a consumer when they buy plumbing fixtures from you must make their own arrangements with respect to the installation of the fixtures.

A. Most of the time, yes.

Q. Could you tell me this, Mr. Schreibstein; are your sales of plumbing fixtures primarily in three-piece sets?

A. Yes, sir.

Q. What does a three-piece set consist of?

A. A bathtub with all its fittings, a toilet outfit with all its fittings, and a basin with all its fittings.

* * * * *

263 Q. Mr. Schreibstein, you have testified that certain customers located in Camden are competitors of yours.
264 To refresh your recollection, you testified on direct examination that these included Central Supply, Harry Arensberg, Camden Plumbing Supply, J. B. Johnson, Mott & Company and Hajoca. Do you know what per cent of Hajoca's sales would be sold to plumbing contractors?

A. I couldn't tell that.

Q. Do you know what per cent of Hajoca's sales might be sold to projects?

A. I could not tell you.

Q. Would you know in 1957 what per cent of Camden Plumbing Supply's sales may have gone into projects?

A. I could not tell you what percentage. I might have an idea but I couldn't honestly tell you what their percentages are.

Q. That is all I am attempting to elicit, Mr. Schreibstein.

A. Pardon me?

Q. That is all I am attempting to elicit, is whether or not you know of your own personal knowledge.

A. But you want facts.

Q. That is right.

A. Not hearsay.

Hearing Examiner Buttle: In other words, you can't state with any reasonable degree of certainty—

The Witness: Oh, no.

Hearing Examiner Buttle: —what the percentage
265 was. Is that what your testimony is?

The Witness: Yes.

* * * * *

Q. Mr. Schreibstein, in your opinion what manufacturer is considered to sell the highest quality of fixtures in the industry?

Mr. Depro: Mr. Examiner, I am going to move—I object to that. That is assuming that there is one that has the highest quality, something that is not in evidence here.

Mr. McAleer: This is cross-examination, Mr. Buttle, and I am asking the witness a question, in his opinion, whether or not there is any particular manufacturer who has the reputation of having the highest quality fixtures.

Hearing Examiner Buttle: Well, do you have an
266 opinion in that respect?

The Witness: I have an opinion that might help you, gentlemen.

Hearing Examiner Buttle: All right.

The Witness: I am a regular guy. I don't think honestly that one manufacturer of the big half a dozen makes a piece of merchandise better in quality than the other, but I think that one has a better presentation than the other by having a more complete line.

By Mr. McAleer:

Q. Then the length of the line of a manufacturer's fixtures is important.

A. Yes.

Hearing Examiner Buttle: Is it important to you?

The Witness: Is it important to me? Yes, it is because I lose sales because I don't have certain items that some manufacturers make and I don't carry their line. A woman will come in with her builder or plumber and have an idea, and she saw a certain bathroom advertised in a magazine that fits into her motif or color scheme or something, and I have lost sales because of that.

By Mr. McAleer:

Q. It is important, then, to you that you carry a full line of bathroom fixtures.

A. It is important that I carry a full line of bath-
267 room fixtures. But not—when you say a full line, that word "full" covers a multitude of things, sir. And in order to have a full line of bathroom fixtures, I would have to carry those that are made by a half dozen predominant

manufacturers in order to please everybody and not lose any sales.

Q. Did you not. Mr. Schreibstein, in 1957, did you not look to Universal-Rundle to supply you with any particular fixtures that your customers may call for in 1957?

A. I looked to them to furnish me with those things that I had sold and wanted to resell.

Q. So that if a plumbing contractor came in to you in 1957 and wanted a particular type of fixture, if he wanted a 14-inch tub, you would have to have a source which would have a 14-inch bathtub, is that correct?

A. Well, according to the invoice in 1957, Rundle was already making them and that is who I bought them through.

Q. That is true with the 16-inch tub.

A. Same thing.

Q. Was that similarly true with respect to the various sizes of lavatories which you might purchase?

A. Oh, certainly, unless I got a request, which I did, for 36-inch lavatories which Rundle didn't make. Some people had a big bathroom. In those days there was no such thing as vanettes like there is today, cabinets under the basins. So they wanted a 36-inch basin. Rundle didn't make a 36-inch basin, so I had to switch my customer over to a manufacturer who made it, namely, American-Standard. And they got the sale because they made the more complete line.

Q. Do you buy bathtubs for—strike that.

You have purchased plumbing fixtures from other sources. You mentioned American Standard and Kohler.

A. Yes.

Q. Do American Standard and Kohler both sell a 14 and a 16-inch bathtub?

A. Yes.

273 By Mr. McAleer:

Q. Do you recall, Mr. Schreibstein, at the time that I interviewed you that you stated that on many occasions you were able to undersell Sears, Roebuck in the sale of plumbing fixtures?

A. Yes.

Q. Do you also recall that you told me at that time that with the exception of certain special sales that might be made by Sears, Roebuck your prices were usually be-
274 low the general prevailing prices of Sears?

A. Yes.

Q. Do you also recall, Mr. Schreibstein, that in our discussions of a year ago you referred to Sears, Roebuck as your Godfather or Grandfather?

A. I said Godfather.

Q. What did you mean by that remark, Mr. Schreibstein?

A. Well, I am sure you don't want me to go into length, but I will tell you what I mean. I got that word Godfather from the biggest plumber in Philadelphia, who at one time I was in business with. His name is Daniel J. Keating and I was going to open up twenty-five stores just like I have with him; and at that time he said, let us open stores near Sears, Roebuck because they will be a Godfather. Now, what I meant by that is this: I am known in the industry as a DTU, meaning "direct to you". I do not protect the plumber. A woman, a home-owner, a poor man who wants to put a bathroom in his house can come and buy that bathroom from me at the same price that a plumber would buy it from me. I do not give the plumber confidential discounts. That is the way Sears, Roebuck operates. They have one price to everybody and because I am a DTU and because there has been problems in some municipalities that did not want people to buy their own bathrooms and only want them to go through the plumber because of an

inspection label system—If you are familiar with it—
275 that is why I call Sears, Roebuck my Godfather, because they would fight my battle also. In other words, you take in Camden. There is a law that if I sell you a toilet or a bath tub I must put a sticker on that and report it to City Hall.

Hearing Examiner Buttle: Strike what the witness says the law is.

The Witness: Shall I stop along this line, sir?

Hearing Examiner Buttle: I have just stricken one bit of your testimony, but you can proceed.

The Witness: In other words, Sears, Roebuck sells direct to consumers and I sell direct to consumers. That is not true of all plumbing supply jobbers. A good many of them will only sell to mechanics.

By Mr. McAleer:

Q. Do you recall, Mr. Schreibstein, at the time we interviewed you a year ago that you expressed a hope that you could move next door to a Sears, Roebuck store?

A. Yes, but I had a reason for it and the reason I told you was that their mediocre sales help lost more sales accidently so that I could make a good living out of their having no knowledge of the business.

Q. Mr. Schreibstein, I—

Hearing Examiner Buttle: So it is not the product but is the sales help that would divert business to you; is that it?

276 The Witness: That is right, because the help is inexperienced and in ninety percent of the cases they are switched from one department to another and can't give good advice to the people as to what they need for their purpose.

Hearing Examiner Buttle: Your testimony was, as I understand it, their product was as good as your product?

The Witness: Yes.

Hearing Examiner Buttle: That was in 1957?

The Witness: Yes.

281 By Mr. McAleer:

Q. Mr. Schreibstein, in buying plumbing fixtures in 1957 from Universal-Rundle, did you buy in both truckload and less than truckload quantity?

A. Yes.

Q. You also testified, I think, on direct-examination
282 that you picked up from the factory in Camden?

A. Yes.

Q. Were you aware of the fact that there was a discount available on truckload shipments?

A. Yes.

Q. You testified on direct examination that the two percent cash discount was very important to you?

A. Yes.

Q. Why, Mr. Schreibstein, if the two percent cash discount was very important to you did you not avail yourself of the truckload quantity and get the lower price on truckload shipments?

A. Well, at various times I did. When I bought truckloads I bought items that moved right along, stocked items that I didn't mind carrying over. That is what I bought in truckload quantities, but pickups I bought different items that don't sell rapidly.

Now, even if I could save five percent on let's say green bath tubs, if I don't have need for them what good is that five percent to me if they have to lay in the warehouse.

Q. But you are telling me then, Mr. Schreibstein, that it cost you more to inventory the particular product?

A. Oh, certainly it cost me more.

Q. Then in effect, Mr. Schreibstein, you usually
283 came to Universal-Rundle as your warehouse?

A. I certainly did.

Q. Would it be correct to state then, Mr. Schreibstein, that the truckload discounts that were available to you were not sufficiently attractive to offset the warehousing cost that would be incurred if you bought in those quantities?

Mr. Depro: I object to that, Mr. Examiner. It calls for a conclusion. He has already answered the question.

Hearing Examiner Buttle: Read the question, please.

(The pending question was read.)

Hearing Examiner Buttle: What he has testified to indicates that. The objection is sustained.

* * * * *

284 Q. Do you buy any fixtures from Chicago Pottery?

A. I have bought toilet articles from Chicago Pottery Company.

* * * * *

285 By Mr. McAleer:

Q. Mr. Schreibstein, in 1957 what other manufac-
286 turers did you buy cast iron sinks from other than Universal-Rundle?

A. Now, when you say other manufacturers do you mean that I purchased direct from them or from their agents or dealers? Because I told you before that I did not buy American Standard or Kohler fixtures from the factory direct.

Q. I am asking you which ones in 1957 you bought direct from the factory?

A. None.

Q. What other manufacturers' lines did you carry in 1957 for cast iron sinks?

A. Both American Standard and Kohler.

* * * * *

287 Q. What are the drillings on a cast iron sink, Mr. Schreibstein?

A. The sinks that I bought from Universal-Rundle were drilled for 8-inch fawcetts.

Q. The cast iron sinks that you purchased from Kohler, what were the drillings on those?

A. 8-inch.

Q. What were the drillings on the cast iron sinks purchased from the American Standard?

A. 8-inch.

294 By Mr. McAleer:

Q. Mr. Schreibstein, when a plumber remodels a bathroom does he usually attempt to have all of the fixtures in the bathroom of the same style?

A. Yes.

Q. It is unusual then, is it, Mr. Schreibstein, for a plumber to mix a fixture of various manufacturers?

A. Very unusual unless on very cheap jobs where the consumer, the ultimate consumer, doesn't care whether the tub is made by one factory and the basin by another. It is very unusual. But in remodelling old houses where they are trying to do it with the least amount of investment they will shop around and buy a steel tub from one manufacturer, a basin from another and a toilet outfit from another irregardless that there are about ninety shades of white and the three whites don't match; but they don't care as long as they have the purpose that they need.

Q. That, however, is the isolated case, is it not, Mr. Schreibstein?

A. It is an isolated case where they don't care; sure.

Hearing Examiner Buttle: In other words, where it is a replacement they are more apt to do that?

The Witness: Yes.

* * * * *

296 *Redirect Examination by Mr. Depro.*

297 Q. Mr. Schreibstein, on cross-examination you mentioned one line, one manufacturer's line that was more complete than others. Which one did you name?

A. American Standard.

Q. American Standard. Then you were asked about Sears and what you had told Mr. McAleer when he had visited you and interviewed you sometime ago that you sold at lesser prices than Sears. Did you, or just what did you say about it?

A. What I mean was that I could compete with them under normal conditions unless they ran a sale and gave an item away. Normally I can compete with them.

Q. How often did they run a sale?

A. Periodically.

Hearing Examiner Buttle: He said that he could compete with them not because of the product but because of the poor salesmen that they had, as I recall his testimony.

Mr. Depro: Yes, he did.

Hearing Examiner Buttle: So I see no point in developing that.

Mr. Depro: I didn't want to go any further into that, Mr. Examiner, but I did want to bring out these special sales that Sears have.

By Mr. Depro:

298 Q. If you know, how often did they run these special sales?

A. I cannot tell you how often, but I can tell you it has been happening at least once a month.

Q. I see.

Hearing Examiner Buttle: That has been your observation?

The Witness: Yes.

Hearing Examiner Buttle: And you don't know how frequently they had the sales?

The Witness: No.

Hearing Examiner Buttle: All right.

• • • • •

300 SOL GREENFIELD was thereupon called as a witness
301 for the Commission and, having been first duly sworn, testified as follows:

Hearing Examiner Buttle: Give your name and address to the Reporter.

The Witness: Sol Greenfield, 52 Hilldale Road, Cheltenham, Pennsylvania.

• • • • •

303 Hearing Examiner Buttle: Let the record show that we have reconvened in the matter of Universal-Rundle, Docket No. 8070, at 9:40 a.m. in Court Room 7, U. S. Court House, Philadelphia, Pennsylvania, at the aforesaid time, on October 17, 1962.

SOL GREENFIELD resumed the stand, having been previously duly sworn, and testified as follows:

Direct Examination by Mr. Lipnick.

Q. Will you state your name, please, sir?

A. Sol Greenfield.

Q. And what is your residence address?

A. 52 Hilldale Road, Cheltenham, Pennsylvania.

Q. What is your business address, Mr. Greenfield?

A. 1935-45 North Front Street.

304 Q. And what business is that?

A. Plumbing, heating.

Q. Is there a name of that business?

A. Mars Supply Company.
Q. Is that a corporation?
A. Yes, it is.
Q. Are you an officer of the corporation?
A. Yes, I am.
Q. What office do you hold?
A. Secretary-Treasurer.
Q. What is the business of Mars Supply Company?
A. What we sell?
Q. Yes.
A. Plumbing, heating, kitchen equipment.
Q. I'm sorry. Would you repeat that, please?
A. Plumbing and heating, kitchen equipment.

By Mr. Lipnick:

Q. What are your duties as secretary-treasurer of Mars Supply Company, sir?
305 A. Well, more or less oversee around the place, see when the men come in, when they leave, merchandise coming in, merchandise going out.
Q. Do you have any official duties in connection with sales by Mars Supply Company?
A. I do a little selling occasionally.
Q. Do you have any duties insofar as supervision of sales is concerned?
A. A little of that also, yes.
Mr. McAleer: I'm sorry. I didn't hear the answer, sir.
The Witness: A little of that also.

By Mr. Lipnick:

Q. Do you have any duties insofar as purchasing by Mars Supply?
A. A little of that. We divide it amongst ourselves in the business.
Q. Who are the other officers of Mars Supply Company?

A. Arus Greenfield.

Q. And what office does he hold?

A. President.

Q. Is he a relative of yours?

A. Brother.

Q. How long have you been with Mars Supply Company?

A. I imagine since 1946.

306 Q. And during that time have your duties been substantially the same as they are now?

A. Yes, they are.

Q. And for that entire time, from 1946 to the present date, would you consider yourself to have been active in the general operations of Mars Supply Company?

A. Yes, I have.

Q. Mr. Greenfield, do you also have a trade?

A. Yes, I do.

Q. And what is that trade, sir?

A. I am a plumber.

Q. And have you actually worked as a plumber at any time?

A. Yes, I have.

Q. And for how long did you work as a plumber, sir?

A. About twenty years.

Q. And was that here in Philadelphia?

A. Yes.

Q. Does the City of Philadelphia have a system of licensing certain people to act as plumbers?

A. Yes, they do.

Q. And during that twenty year period did you have a license as a plumber?

A. I had a journeyman's license.

Q. Does Mars Supply Company deal in plumbing fixtures, sir?

A. Yes, they do.

307 Q. And when I say plumbing fixtures, do you understand that term to include bathtubs?

A. Yes, I do.

Q. You understand the term to include lavatories?

A. Yes.

Q. Water closets?

A. Yes.

Q. Tank units?

A. Yes.

Q. Tank bowls?

A. Yes.

Q. Kitchen sinks?

A. Yes.

Q. Does Mars—to what type of customer does Mars Supply Company resell plumbing fixtures?

A. We sell to anyone that will come into our store.

Q. Does the term DTU have any meaning to you, Mr. Greenfield?

A. Yes, it does.

Q. And what does that term mean to you?

A. More or less anybody that will walk into the store, that we sell our merchandise to them.

Q. Is Mars Supply Company—strike that. Does Mars Supply Company operate as a DTU?

A. Yes, they do.

308 Q. When you sell plumbing fixtures, do you sometimes deliver them to an address given to you by your customer?

A. Yes, we do.

Q. Do you do that with a large majority of your sales or not so many or—

A. Large majority.

Mr. McAleer: I object, Your Honor.

Hearing Examiner Buttle: Yes. Objection sustained. But you may pursue that, but you are asking the witness

to characterize, and in addition to that, it is a matter of definite terms.

Mr. Lipnick: Yes, sir.

By Mr. Lipnick:

Q. Mr. Greenfield, would you give me your best estimate of the percentage of plumbing fixtures which Mars Supply Company sells which are following the sales delivered by Mars Supply Company to the purchaser?

A. About 80 per cent.

Q. And when I use the term "deliver", did you understand me to mean delivered to the purchaser's address?

A. Yes, I did.

Q. Are you in the course of your duties with Mars Supply Company—have you had occasion to be familiar with the type of building which was located at some of the addresses to which these fixtures were delivered?

309 A. No.

Q. Have you had occasion to become familiar with the addresses themselves?

Mr. McAleer: I object, Your Honor. I don't know what relevancy this has to the issues in this case. He is talking about addresses.

Hearing Examiner Buttle: Have you had occasion to what? I couldn't hear the rest of it.

(The reporter read the question as follows:

"Question: Have you had occasion to become familiar with the addresses themselves?")

Hearing Examiner Buttle: Sustained.

By Mr. Lipnick:

Q. Mr. Greenfield, have you—strike that.

In connection with your duties as an official of Mars Supply Company, have you had occasion to become familiar with the cities and states to which Mars Supply Company delivered plumbing fixtures to its customers?

A. Well, I live here, so I know the city. I am familiar with the city.

Q. I think I had better rephrase—

Hearing Examiner Buttle: Are you trying to find out where his customers are?

Mr. Lipnick: Yes.

Hearing Examiner Buttle: Where are they?

310 The Witness: Philadelphia, Jersey. We advertise all over.

By Mr. Lipnick:

Q. Did you say you advertise?

A. Yes.

Q. And where do you advertise, sir?

A. In the Philadelphia papers.

Q. Which papers would those be?

A. The Inquirer and the Bulletin.

Q. Do you know of your own knowledge whether those papers are circulated in southern New Jersey, particularly in and around Camden, New Jersey?

A. Yes.

Q. And are they?

A. Yes.

Q. Mr. Greenfield, do you know—

Hearing Examiner Buttle: The purpose of the advertising is to seek customers in those markets.

The Witness: That is right.

By Mr. Lipnick:

Q. Mr. Greenfield, do you know the meaning of the term "project" as applied to plumbing installations?

A. I think I know what you mean.

Hearing Examiner Buttle: What does it mean to you, sir?

311 The Witness: Building operations.

By Mr. Lipnick:

Q. Mr. Greenfield, does Mars Supply Company engage in submitting bids on installations of large numbers of plumbing fixtures to construction projects which involve multiple units?

A. No.

Q. In 1957 did Mars Supply Company purchase plumbing fixtures from Universal-Rundle Corporation?

A. Yes.

Q. In that year would you tell us which manufacturers were Mars supplies' principal suppliers of plumbing fixtures?

A. Universal-Rundle and Gerber.

Q. Would you be able to give us the approximate percentage of your purchases of plumbing fixtures which were made from Universal-Rundle?

A. That we have purchased from them?

Q. In 1957.

A. All I can say is over 50 per cent.

Q. In connection with your duties as an officer of Mars Supply Company, and in the conduct of that business, have you had occasion to form any opinion with respect to who your competitors are in connection with the sales of plumbing fixtures?

A. We considered a few strictly our competitors.

312 Q. Who do you consider to be your competitors, sir?

A. Well, a concern called Kurland's.

Q. Are there any others?

A. In 1957, you are referring to?

Q. Yes.

A. There was a concern called Mort's. There was Central at that time, I believe, in Philadelphia.

Q. Central in Philadelphia.

A. Yes. Sears, Roebucks. A few others I can't think of at the present time.

Q. Now, would you tell us, if you will, please, Mr. Greenfield, a little bit about the operation of Mars Supply Company.

Mr. McAleer: I object, Your Honor. I don't know what —I have no idea of what he means by "a little bit" of the operation.

Mr. Lipnick: I haven't finished the question.

Hearing Examiner Buttle: Wait a minute. He says he hasn't finished the question. In addition to that, I didn't hear it. Can you remember what you asked?

Mr. Lipnick: I will rephrase the question.

Hearing Examiner Buttle: All right.

By Mr. Lipnick:

Q. Mr. Greenfield, in connection with sales of plumbing fixtures by Mars Supply Company, in 1957 did you 313 maintain a showroom?

A. Yes.

Q. Approximately how large was that showroom?

A. I imagine the width is 180 by over 100 feet, 150 feet in depth.

Q. Did you ever—did you have displays in that showroom? Plumbing fixtures?

A. Yes, we do.

Q. In 1957 approximately how many plumbing fixtures did you display in that showroom?

A. Bathroom displays?

Q. How many pieces?

A. It is hard to say. Over hundreds.

Q. Did you maintain a warehouse?

A. Yes, we did.

Q. Did you carry an inventory of plumbing fixtures in that warehouse?

A. Yes, we did.

Q. Approximately what was the dollar volume of your inventory in 1957?

A. I am not in a position to say.

Q. Did you employ salesmen?

A. Yes, we did.

Q. Were they paid a salary?

A. No. They were on a commission basis. Some-
314 times on a commission basis and sometimes part salary.

Q. How many salesmen did you have in 1957?

A. I would say at least two, if not three.

Q. Did you own any—did Mars Supply Company own any delivery trucks in 1957?

A. We leased our trucks.

Q. You leased them?

A. Yes, we did.

Q. Did you employ drivers?

A. Yes, we did.

Q. How many drivers did you employ?

A. Anywhere from one—or sometimes two.

Q. Did you employ office help?

A. Yes, we did.

Q. How many people did you employ as office help?

A. Approximately two.

Q. Did you ever extend credit to your customers in 1957, sir?

A. No.

Q. Mr. Greenfield, directing your attention to 1957, in your opinion was price competition a major factor in that year in competition with your competitors?

Mr. McAleer: I object, Mr. Examiner.

Hearing Examiner Buttle: You will have to let him finish the question. Don't answer it until I rule on the
315 question.

(The reporter read the question as follows:

"Question: Mr. Greenfield, directing your attention to 1957, in your opinion was price competition a major factor in that year in competition with your competitors?")

Hearing Examiner Buttle: Sustained. Objection sustained. You may pursue it but, you see, you are calling for a conclusion.

Mr. Lipnick: Yes. I understand.

By Mr. Lipnick:

Q. Mr. Greenfield, in the course of your performance of your duties as secretary-treasurer of Mars Supply Company, did you sometimes act as a salesman on the floor of your showroom?

A. Yes, I did.

Q. And did the salesmen employed by Mars Supply Company sometimes have occasion to report to you things which their customers might have said to them or things which their customers might have asked for in connection with sales of plumbing fixtures by Mars?

A. Yes, they do.

Q. In 1957, sir, did you personally observe customers looking at price tags in your showroom?

A. Yes, I have.

316 Q. In 1957, sir, did you ever overhear a customer comparing your price to a price they had obtained elsewhere?

Mr. Fruchterman: Objection, your Honor. This would be hearsay if he is calling for that.

Hearing Examiner Buttle: Well, it may have some bearing insofar as what this witness said and did and acted upon. I don't know. I will not concede the truth of what might have been said to him but I will receive it if it is reflective of what this witness said, did or acted upon.

If it doesn't reflect that, your appropriate relief is to make a motion to strike.

Mr. Lipnick: If the Examiner please, I am asking this question to prove the fact that his customers did say it, not that it was — not that what they said was necessarily true but only the fact that they did say it.

Hearing Examiner Buttle: Only that they said it, yes. All right. That is proper.

Mr. Lipnick: That is not hearsay.

Mr. Fruchterman: If the fact that a person says something is the point in issue, in other words, that the person spoke, certainly it would be received. It wouldn't be part of the—it would be an except to the hearsay rule, but here he has no purpose in bringing up what this witness said.

Hearing Examiner Buttle: I don't know whether he 317 has the purpose. Look, I gave my ruling. I explained my ruling and I told you what you could do about it.

Mr. Fruchterman: Thank you, sir.

Hearing Examiner Buttle: I have already disposed of that. Now, just to say it is merely to establish what he said, it must be for some purpose. It must be for the purpose of establishing what this witness did or acted upon or for the purpose of explaining what this witness said.

Mr. Lipnick: Would you read the question, please?

(The reporter read the question as follows:

"Question: In 1957, sir, did you ever overhear a customer comparing your price to a price they had obtained elsewhere?")

The Witness: Yes, I have.

By Mr. Lipnick:

Q. In 1957 did any of your salesmen ever report to you that they had overheard such comments made by customers?

A. They may have.

Q. You don't remember?

A. No: I wouldn't remember.

Hearing Examiner Buttle: Well, in this connection would you use the information that you acquired in this way for any purpose insofar as marketing your own goods was concerned?

The Witness: It would give us an idea of how to
318 pursue—

Hearing Examiner Buttle: As to what the market was.

The Witness: That is right.

Hearing Examiner Buttle: All right.

By Mr. Lipnick:

Q. Mr. Greenfield, will—were you responsible for making major decisions in the conduct of the business operations of Mars Supply?

A. We make our decisions—we get together and make these decisions.

Q. Who gets together and makes these decisions?

A. My brother and I.

Q. I'm sorry.

A. My brother and I.

Q. On the basis, sir, of reports made to you by your salesmen in 1957, and on the basis of your own experience in dealing with your customers when you were on the floor selling yourself, did you reach any conclusion as to the major factors or did you form an opinion as to what the major factors of competition were in the sale of plumbing fixtures in 1957?

Mr. McAleer: Objection.

Mr. Fruchterman: Objection.

Hearing Examiner Buttle: Well, sustained. Did
319 you reach any conclusion as to what you would have to do in selling in the same market that others in the same

market—same business you were in, were selling? Do you understand that?

The Witness: In other words, if I—if that would give us an idea of how to conduct our business.

Hearing Examiner Buttle: Yes. How to seek the markets.

The Witness: Seek the markets, yes.

Hearing Examiner Buttle: Well, in seeking the markets as a result of this information, what factors did you consider after receiving this information?

The Witness: We considered if it is feasible for us to meet the competition.

Hearing Examiner Buttle: Well, did you consider what you had to do to meet the competition in your terms?

The Witness: We made a study of the information that we have got and from that we form a conclusion to see—

Hearing Examiner Buttle: Yes. Well, what conclusions did you come to specifically with regard to what you had to do in order to meet the competition?

The Witness: Either to meet the price market or not meet it.

Hearing Examiner Buttle: Was price the only factor that you considered?

320 The Witness: Most of the time, yes.

Hearing Examiner Buttle: Well, was quality a factor you had to consider?

The Witness: Well, it was a lack of information that we got. We only had the price to consider. We didn't see the merchandise that the customer saw elsewhere.

Hearing Examiner Buttle: You pursue it from there.

By Mr. Lipnick:

Q. In 1957, Mr. Greenfield, did Mars Supply Company purchase every item offered for sale by Universal-Rundle Corporation to its trade customers?

A. No.

Q. Did you purchase every vitreous china item which was available to you?

A. No.

Q. Did you purchase every cast iron item that was available to you from Universal-Rundle?

A. I don't think so, no.

Q. Did you purchase every steel item which was available to you?

A. No.

Q. Did you purchase every cast iron bathtub they made?

A. I wouldn't say we purchase every one, no.

Q. I'm sorry.

321 A. No.

Q. Did you purchase every cast iron sink?

Hearing Examiner Buttle: Now, wait a minute First, he didn't purchase every one. You mean any particular model or whatever you wish to call it.

Mr. Lipnick: I had thought the witness would understand my meaning.

Hearing Examiner Buttle: Well, I suppose—every type is what he is referring to. Did you purchase every type?

Mr. Lipnick: Every model I think would be apt.

Hearing Examiner Buttle: Every model or whatever you wish to call it.

The Witness: I believe we did, yes.

By Mr. Lipnick:

Q. That was of cast iron?

A. Yes.

Q. Did you purchase every size of cast iron sink which they made?

A. Yes.

Q. Did you purchase every size lavatory?

A. No.

Q. Did you purchase every brass item which they sold?

A. No.

Q. Would you tell us what you understand the term
322 "brass" to mean, please?

A. Brass in the plumbing business is a term that means spigots, faucets, drains, shower rods.

Q. Are there any other words which mean substantially the same as brass in the industry?

A. Fittings.

Q. Have you ever heard the word "trim"?

A. Trim, yes.

Q. Were you—was it part of your duties as an official of Mars Supply Company to be familiar with items marketed by other manufacturers, manufacturers other than your own suppliers?

A. We tried it, to know what others are making, yes.

Q. Who would you consider in 1957 to have been the other four—the four most significant manufacturers of plumbing fixtures other than your own suppliers?

Mr. McAleer: I object, your Honor.

Hearing Examiner Buttle: On what grounds?

Mr. McAleer: He is asking for a conclusion by the witness. I don't know what he means when he says significant manufacturers.

Hearing Examiner Buttle: Was that without the word significant?

Mr. Lipnick: Yes.

Hearing Examiner Buttle: Well, I will sustain the
323 objection.

By Mr. Lipnick:

Q. Did you form an opinion in 1957 as to which plumbing manufacturers had the greatest consumer demand and acceptance for their products in Philadelphia, sir? Yes or no, please.

A. Did I know of them?

Q. Did you form an opinion?

A. Yes.

Q. You did?

A. Yes.

Q. And would you be able to tell us now—and please answer this question yes or no, too—would you be able to tell us now what your opinion was insofar as the four manufacturers other than your own suppliers who in your judgment had the greatest demand and acceptance for their products?

A. You want me to answer that yes or no?

Q. Yes, please, Would you be able to tell us?

Hearing Examiner Buttle: Do you have an opinion?

The Witness: Yes, I have an opinion.

By Mr. Lipnick:

Q. And what is that opinion, sir?

A. You want me to name them?

Q. Yes, please, the top four.

A. I consider American Standard, Kohler, Eljer, Richmond. Maybe Crane in there.

324 All right. Fine.

Did you in the performance of your duties with Mars Supply Company in 1957 become familiar with the lines of fixtures marketed by the companies you have just named?

A. I have a rough idea.

Mr. McAleer: I am sorry. I didn't hear the answer.

The Witness: A rough idea of what they made.

By Mr. Lipnick:

Q. Did you obtain a rough idea as far as the quality of those fixtures was concerned as compared to the quality of the fixtures which you carry?

A. Yes.

Mr. McAleer: I object, Mr. Buttle.

Hearing Examiner Buttle: Sustained. You said, did you obtain a rough idea.

Mr. Lipnick: I am just using his words. He said he had a rough idea. The witness in response to the last question—

Hearing Examiner Buttle: I don't care what he said. But I don't want to hear his rough idea. I want to hear it only if he can state with a reasonable degree of certainty or with reasonable certainty. Suppose you put it that way.

By Mr. Lipnick:

325 Q. Mr. Greenfield, can you state with a reasonable degree of certainty an opinion as to the quality of the plumbing fixtures marketed by those four or five companies that you named as compared to the quality of the fixtures which you carried in 1957?

Mr. McAleer: I object, Mr. Buttle. He is asking for a conclusion by the witness. He has not defined what he means by quality.

Mr. Lipnick: Mr. Examiner, may I be heard?

Hearing Examiner Buttle: Yes. Well, there is a little confusion because you combined the opinion with it. Suppose you restate that question and then we will argue about it.

Read the question.

(The reporter read the question as follows: "Question: Mr. Greenfield, can you state with a reasonable degree of certainty an opinion as to the quality of the plumbing fixtures marketed by those four or five companies that you named as compared to the quality of the fixtures which you carried in 1957?")

Hearing Examiner Buttle: Well, that is—yes, I will have to sustain the objection but I am not going to preclude you from pursuing this. I think you will have to rephrase the question.

326 Mr. Lipnick: May I be heard, Mr. Examiner?

Hearing Examiner Buttle: First ask him if he has an opinion with regard to the quality and then proceed from there. You may be heard, certainly.

Mr. Lipnick: With respect to this line of questions, Mr. Examiner, which counsel for respondent seems to be objecting to on the grounds that I am calling for a conclusion of the witness, just as counsel for the respondent contended that Mr. Backner was an expert in the same industry and could therefore state certain conclusions and opinions, I feel that this witness on the basis of his experience as a plumber and as a reseller of plumbing fixtures is also qualified to testify as an expert in the plumbing fixtures business, and as such, he is entitled to state certain conclusions and opinions in order to help us decide the issues of this case.

Hearing Examiner Buttle: Yes. Well, I am not sustaining the objection for that reason. I simply told you to ask him whether or not he can state with a reasonable degree of certainty, but then you inserted the word "opinion" and I would rephrase the question. I would put it one way or the other. Now, he certainly in my opinion—it is my ruling—is qualified to have an opinion himself with regard to the quality of fixtures and I think that has been established.

Of course, it is not going to be—not going to amount
327 to very much insofar as the evidence unless it is further developed what is meant by quality because you have to ask the first question before you ask the second and third and fourth.

So I am sustaining the objection, but you may pursue the interrogation along these lines.

Mr. McAleer: May I point out, Mr. Buttle, that Mr. Greenfield here is the Commission's witness and Mr. Greenfield has already testified that he only had a rough idea of the quality of the fixtures that might—

Mr. Lipnick: That is not what he testified.

Hearing Examiner Buttle: Well, that is perfectly true, but sometimes we use phraseology of that kind not knowing exactly what we mean. He can certainly ask him to state with a reasonable degree of certainty, and if he can, fine, but I will permit—he did say he just had a rough idea, that is true, but he may mean by rough idea—I don't know what he does mean. He may mean that he has a general idea, which means he may have an opinion generally.

Now, I have permitted you to interrogate along those lines without any question and so I am going to permit him to—permit Mr. Lipnick to pursue that question. But on the other hand, he will have to reframe his question.

Objection sustained for the reasons I have indicated.

328 Mr. Lipnick: I might say this for the record, Mr. Examiner. It is my recollection that the witness' testimony, that he did not state that he had a rough idea as to the quality of the fixtures. He stated he had a rough idea as to the fixtures marketed by the other companies.

Hearing Examiner Buttle: Well, I think that is so. You may pursue your interrogation.

Mr. Lipnick: Thank you, sir.

By Mr. Lipnick:

Q. Mr. Greenfield, did you form an opinion as to the comparitive quality of the fixtures marketed by American Standard, Kohler, Eljer, Crane, Universal-Rundle, and Gerber?

Mr. Fruchterman: Objection, your Honor.

Hearing Examiner Buttle: Overruled.

The Witness: Yes.

By Mr. Lipnick:

Q. What was that opinion?

A. I believe they are all on par,

Q. And by quality, what did you understand me to mean, sir?

A. Just what quality means, that it is equal to one or the other.

Hearing Examiner Buttle: Well, do you mean it is made well and the material that is used in making it is good?

The Witness: That is right.

329 Hearing Examiner Buttle: Is that what you mean?

The Witness: Yes.

Hearing Examiner Buttle: Is it your opinion that all of the products of these companies were of good quality, then?

The Witness: I believe so, yes.

Hearing Examiner Buttle: And equally of good quality is your testimony.

The Witness: Yes.

Hearing Examiner Buttle: Is that it?

The Witness: That is right.

388 Q. Mr. Greenfield, when you purchased from Universal-Rundle in 1957, do you know whether or not your firm made it a practice to take advantage of any discounts which were offered for prompt payment?

A. Yes.

Q. Did they?

A. Yes.

Q. What was that discount?

A. Two percent.

Q. And did you always take advantage of it or did you sometimes take advantage of the discount or did you rarely take advantage of it with Universal-Rundle?

A. We always took advantage of it with Universal-Rundle.

Hearing Examiner Buttle: You always did?

The Witness: We always did.

By Mr. Lipnick:

Q. In your judgment as an officer of the firm, would that two percent cash discount from Universal-Rundle be important to your business operation?

A. Yes.

Q. In what respect was it important and how impor-
389 tant was it?

A. Well, we based our cost price on that. In other words, we took into consideration that we got two percent and that was our price of the unit.

* * * * *

Q. Directing your attention to 1957, sir, in your opinion, in the conduct of your business, if another seller of plumbing fixtures who operated as a DTU and who was located in Philadelphia or in Camden were purchasing the same plumbing fixtures as you purchased from the same suppliers for five percent less, in your opinion, would your ability to compete with that other house be impaired?

Mr. McAleer: Objection, your Honor. I say the question calls for a conclusion by the witness.

Mr. Lipnick: May I be heard, your Honor?

Hearing Examiner Buttle: Yes.

Mr. Lipnick: Your Honor, I submit that this witness is cretainly qualified as an expert in the conduct of his own business.

Hearing Examiner Buttle: Just let me stop you. In other words, you are admitting it is a hypothetical question?

Mr. Lipnick: Absolutely. I am asking him for his
390 expert opinion on his own business, sir, and on competition which he experienced in 1957. I think the proper foundation has been laid for asking that hypothetical question of this witness.

* * * * *

Hearing Examiner Buttle: Well, I will hear more from Mr. McAleer about that. You say it is a hypothetical question, but what bothers me is does it call for a legal conclusion.

Hearing Examiner Buttle: Yes, I am afraid so.

Mr. McAleer: It was a hypothetical question and
391 it called for a legal conclusion.

Hearing Examiner Buttle: I mean, of course—

Mr. Lipnick: Very well, I will withdraw it.

Hearing Examiner Buttle: If it called for a factual conclusion that is all right if he is an expert, and in that case a hypothetical question is appropriate, but I am afraid it calls for a legal conclusion.

Mr. Lipnick: I will withdraw it, sir.

By Mr. Lipnick:

Q. Mr. Greenfield, in your opinion, if you were purchasing plumbing fixtures in 1957 for five percent more than another house was purchasing the identical fixtures for from the same suppliers, would you be able to sell these fixtures consistently for five percent more than the other house sold them?

Mr. Fruchterman: Objection.

Hearing Examiner Buttle: In your opinion?

Mr. Fruchterman: Your Honor, it is a hypothetical question, but as I understand it, before a hypothetical question can even be put to an expert there must be a foundation in fact for the hypotheses in the record.

Hearing Examiner Buttle: Well, as a matter of fact, I think what you say is true. I think the foundation has been laid with this witness. He testified that as to his experience in this market and he is an expert in market-
392 ing these products. I will have to rule that his expertese has been sufficiently shown so that he can answer this question, although I think the first question

should be to ask him whether or not he has an opinion and then ask him what it is.

Mr. Lipnick: Very well, I will withdraw the question and rephrase it in any event.

By Mr. Lipnick:

Q. Mr. Greenfield, do you have any opinion as to whether or not your firm could have consistently obtained higher prices for plumbing fixtures than other firms were paying for identical fixtures in the same area?

A. I wouldn't know.

Q. Sir?

A. I wouldn't know.

Q. Was the cost of maintaining your show room of importance to you in 1957?

A. Oh, yes.

Q. And the rental of delivery trucks?

A. Yes.

Q. And the hiring of the trucks for deliveries?

A. Yes.

Q. And the payment of salesmen's commissions?

A. Yes.

Q. And your warehouse?

393 A. Yes.

Q. Your inventory?

A. Yes.

Q. Your advertising?

A. Right.

Q. Your office help?

A. Right.

Q. Was your company required to pay for all of those things out of your gross profit on sales of merchandise?

Mr. Fruchterman: Objection, your Honor. Whether or not the man keeps his books in such a way that he charges his expenses of office operation out of a profit account or

whether he keeps it in an expense account would be immaterial for one thing; but he hasn't even stated where he keeps his books; so whether he charges them out of profit or not there is no foundation laid or the question.

Mr. Lipnick: I will rephrase the question, your Honor.

Hearing Examiner Buttle: All right. I am rather lost on this one, but go ahead.

By Mr. Lipnick:

Q. With respect to your warehouse, sir, does it cost you money to maintain it?

A. Certainly.

Q. Does it cost you money to maintain an inventory?

394 A. Certainly.

Q. Does it cost you money to rent delivery trucks?

A. Certainly.

Q. Does it cost you money to hire salesmen and pay them commissions?

A. Well, that depends on the salesmen, the sales that they make. They get their commissions.

Q. If they get a commission does your company have to pay it to them?

A. Yes.

Q. And does that come out of the bank account of your company or cash box or something?

A. Out of the bank account.

Q. Does it cost you money to hire truck drivers?

A. Yes.

Q. Does it cost you money to hire office help?

A. Yes.

Q. Does it cost you money to maintain your displays in your show room?

A. Yes.

Q. And do you rent your show room or do you own it?

A. We own it.

Q. Do you have to pay taxes on it?

A. Yes.

Q. Do you rent your warehouse or own it?

395 A. We own it.

Q. Do you have to pay taxes on that?

A. Yes.

Q. Do you have to pay upkeep maintenance?

A. Yes, sir.

Q. Do you have to pay for your advertising?

A. Yes, sir.

Q. Now, with respect to paying for all of these items I have listed, where do you get the money to pay for them?

A. Form the profits of the sale of merchandise.

Q. Do you have any other source of income in your business other than the sale of merchandise?

A. No, sir.

* * * * *

397 By Mr. Lipnick:

Q. Mr. Greenfield, in connection with the conduct of your business, have you become familiar with the building code of the City of Philadelphia insofar as it relates to installation of plumbing fixtures?

A. Well, at the present time I am not 100 per cent familiar with it as I was when I was actually working in the trade.

Q. Were you familiar with it in 1957, sir?

398 A. Yes.

Q. Did the building code of Philadelphia in 1957 contain any positive requirements with respect to installation of plumbing fixtures?

A. They required a registered plumber to install all plumbing fixtures.

* * * * *

Cross-Examination by Mr. Fruchterman.

400 Q. How many salesmen did you have on the floor in 1957?

A. If my recollection serves me, two.

Q. I see. And those men worked on a straight commission basis?

A. No. They worked on a salary plus commission.

401 Q. In the year 1957 what commission were you paying?

The Witness: Do I have to answer that, sir?

Hearing Examiner Buttle: Yes.

The Witness: I believe at that time it was two per cent.

405 Q. Back in 1957 you had two salesmen who were selling plumbing fixtures for Mars Supply, and with sale they made they were granted a commission by Mars Supply, were they not?

A. That is right.

Q. So that the more sales they made, the greater amount of pay they finally received, is that correct?

A. That is correct.

Q. On the other hand, when you sold a plumbing fixture or any other bit of merchandise back in 1957 you received no commission for that sale, is that correct?

A. That is correct.

Q. When these customers come into your store, do your salesmen take turns as to who is going to wait on each customer that comes in?

406 Q. Is that correct?

A. Yes.

Q. The reason they do that is because if one took all the

customers, the others would get no commission, is that right?

A. That is right.

Q. Did you wait your turn each time a customer came in?

A. No, sir.

Q. If one of those two men were available to wait on a customer, they would wait on them, wouldn't they?

A. Yes.

Q. Rather than you?

A. Yes, sir.

Q. As a matter of fact, your sales activity would only be in the absence of a salesman, is that correct?

A. Yes, sir.

Q. You would fill in on occasion.

A. Yes.

448 By Mr. Fruchterman:

Q. On direct examination you stated that Mars Supply Company advertises in the newspapers, is that correct?

A. That is right.

Q. Do you advertise in three-piece sets?

A. We have a bathroom set as such.

Q. Well, I understand that at times you advertise heating or roofing or something like that. But I am talking
449 only about plumbing fixtures now, and as far as bathroom plumbing fixtures are concerned, you advertise as a three-piece set, do you not?

A. That is right.

Q. Now, in that ad what do you depict? Do you depict only the fixtures?

A. No. We have it with trim.

Q. Do you depict a water closet of some sort, a lavatory of some sort, and a tube of some sort? Is that correct?

A. That is right.

Q. You would always have those three pieces in your advertisement, would you not?

A. That is right.

Q. But it need not necessarily be the same three pieces in each advertisement, is that correct?

Do you understand my question?

A. Yes. I am just trying to analyze "the same three pieces." The same price-wise, you mean?

Q. No. What I had reference to was this: in each advertisement, when you are advertising bathroom fixtures, you will have a tub, but on occasions it may be a steel tub, on occasions it may be a 14-inch tub, and on occasions it may be a 16-inch tub, is that correct?

A. We don't—our advertising is a little bit different from what you are trying to come to.

450 Q. Well, I am just interested in what your advertisement is like.

A. We usually use a—we don't change our ads as often as you think we do. We just have—probably that same ad has been in the paper maybe four or five years.

Hearing Examiner Buttle: Let's end the conversation and ask a question.

By Mr. Fruchterman:

Q. I don't think anything about this. I want you to understand it. I just want to know what you did.

Hearing Examiner Buttle: Ask him a question.

By Mr. Fruchterman:

Q. Now, you say you use an advertisement which depicts three plumbing fixtures in it, plus trim, is that correct? And in that ad there would be a water closet, a lavatory, and a bathtub.

A. That is right.

Q. But you wouldn't always have to use, or do you always use one specific size lavatory in the ad?

A. Can I answer it in my own way?

Hearing Examiner Buttle: Yes.

The Witness: We use the least expensive one that we have available.

By Mr. Fruchterman:

Q. Well, back in 1957 would you use the least ex-
451 pensive three-piece ensemble that you could buy from Universal-Rundle or would you make it up from other manufacturers?

A. We made it up from other manufacturers.

Q. Back in 1957. And would that cheapest three-piece ensemble have a steel tub?

A. Yes.

Q. A washdown closet?

A. That is right.

Q. And a lav of some sort?

A. Some sort.

Q. Well, now, in addition to your advertising you maintained displays, did you not?

A. That is right.

Q. Each of those displays as far as bathroom fixtures is concerned has a tub, a lav—

A. Yes.

Q. —and a water closet, is that correct?

A. That is right.

Q. But they need not all have the same fixtures in them as far as the individual dimensions of the pieces are concerned, isn't that correct?

A. I don't understand your question.

Q. In other words, you might put an ensemble up with a 19 by 17 lav and a washdown and a cast iron tub.

A. Yes.

452 Q. 14 inches high. You might put an ensemble together with the same lav and the same tub with with a reverse trap. Isn't that correct?

A. Sometimes, yes.

Q. But basically the ensemble is always the three separate pieces but it can be in any number of dimensions, is that correct?

A. That is right. Yes.

Q. And that is the way you sell plumbing fixtures, is it not?

A. Yes.

Q. In three-piece sets.

A. Yes.

Q. Now, when you advertise in the newspapers, do you price each item individually or do you give a total price for the three-piece set?

A. We give a total price for the three-piece set.

Q. For the whole works.

A. That is right.

Hearing Examiner Buttle: Do you give a price for each piece also?

The Witness: No.

Hearing Examiner Buttle: Just for the three-piece set.

The Witness: Yes.

* * * * *

454 By Mr. Fruchterman:

Q. Mr. Greenfield, when Mars Supply advertised back in 1957, I believe you said that they advertised the cheapest set which they could put together. Is that correct?

A. That is correct.

Q. Now, when Mars Supply sold material back in 1957, did it always sell the cheapest set it could put together?

A. No. No.

Q. As a matter of fact, Mars Supply sold many sets containing expensive items, did they not?

A. Yes.

Q. That is, the 16-inch tub, that is an expensive item, is it not?

A. Yes.

Q. Your larger lavs are more expensive than your
455 smaller ones, is that not correct?

A. Yes.

Q. As a matter of fact, you probably sold far more 20 by 17 lavs than you did any smaller size than that, did you not?

Hearing Examiner Buttle: Objection sustained. The probability of what he did is no—

Mr. Fruchterman: Excuse me, Your Honor. I will rephrase the question.

By Mr. Fruchterman:

Q. As a matter of fact, you did sell more lavs in the at least 20-inch length and above than you did the smaller lavs in 1957, did you not? 20 inches and up is what—

Mr. Lipnick: May I have that question read back, please?

Hearing Examiner Buttle: Yes.

(The question was read by the Reporter as follows: "Question: As a matter of fact, you did sell more lavs in the at least 20-inch length and above than you did the smaller lavs in 1957, did you not? 20 inches and up is what—")

The Witness: I would say we sold about equal number.

By Mr. Fruchterman:

Q. Do you know what I mean to say when speaking
456 of plumbing fixtures as bottom of the line?

A. Yes.

Q. And do you know what top of the line means?

A. Yes.

Q. Would you—can you state with a reasonable degree of certainty that Mars Supply sold approximately the middle of the line?

A. With certainty I can say that, yes.

Q. Now, is it your understanding of those terms, or that terminology, that Mars Supply didn't sell only the cheapest articles but they also sold more expensive articles and medium priced articles?

A. Yes.

Q. And you sold just as great a percentage of the medium to upper as you did of the medium to lower, is that correct, sir?

A. I would say so, yes.

Q. You are in the middle.

A. Yes.

Q. But your advertising was directly—directed at the bottom of the line, is that correct?

A. Yes.

Q. Well, now, when a customer comes into Mars Supply looking for a bathroom set, what do your salesmen point out as the features of the various tubs which are dis-
457 played on the floor there?

A. In other words, in our store we have on the floor displays, all model tubs that we sell.

Q. Right.

A. We allow the customer to walk around and examine the various tubs and mostly they will pick out what they want. We do not use high-pressure salesmanship in our store.

Q. Now, you advertise your cheapest bottom of the line pieces in your ads, do you not?

A. That's right.

Q. And those ads draw people into your store, do they not?

A. That is right.

Q. If they didn't, you wouldn't keep advertising year after year, isn't that correct?

A. That is right.

Q. And your salesmen are paid on a commission basis, are they not?

A. That is right.

Q. And you don't sell the cheapest articles that you have for sale. You sell a better class, do you not?

A. We sell the cheapest but we sell the others just the same.

Q. But you sell the better class—

A. To the customer, yes.

Q. And you mean to say your salesmen have noth-
458 ing to do with influencing that choice.

A. We don't care if he does or not.

Q. You mean your salesmen don't say anything to prospective purchasers as to the relative merits of the items displayed in your showroom. One tub versus another tub or one water closet versus another water closet.

A. We may show the difference between the 14 and the 16-inch tub and let it go at that, yes.

Q. No other features would ever be pointed out.

A. He may show the design of the tub and leave it up to the discretion of the—

Q. Well, now, the design of the 14-inch tub and the design on the 16-inch tub manufactured by Universal-Rundle in 1957 were identical, were they not? Design-wise?

A. No, I don't think it was, no.

Q. I show you now Commission's Exhibit 74, page three, and direct your attention to the tub under the trade name Master Meadow, and Commission's Exhibit 74, page four, and direct your attention to the tub depicted thereon under the Meade trade name. What is the difference in design?

A. The only difference I can see from this here picture is that the Master Meadow has a wider seat here than your Meade type. Other than that, I can't tell too much difference, sir.

Q. Well, what other features of the 14-inch tub
459 which your salesmen would point out in opposition to the 16-inch tub—

A. Well, I imagine they would talk about the larger volume of water that is held by the 16-inch tub over the 14-inch tub.

Q. Might they also add that it is easier to get into a 14-inch?

A. They may say that, too.

Q. Suppose the person that they are talking about is six feet, six inches tall and weighs 30 pounds. Are they going to try to sell him a 14-inch tub?

A. I know I won't.

Q. Were the Universal-Rundle manufactured tubs the only tubs which you had in your showroom during 1957?

A. I can't recall that.

Q. You had some steel tubs in stock in 1957, did you not, sir?

A. Yes, we did.

Q. Can you recall whether you purchased them from a manufacturer other than Universal-Rundle?

A. Yes, we did.

Q. Now, those steel tubs which you had in 1957 were sold at a cheaper or lower price than the cast iron tubs which you were handling, were they not?

A. That is right.

Q. Why is that?

460 A. It cost less.

Q. It cost you less?

A. Correct.

Q. And you in turn sell it for less?

A. That is right.

Q. To the consumer, is that correct?

A. That is right.

463 By Mr. Fruchterman:

Q. Do you recall, Mr. Greenfield, whether back in 1957 Mars Supply sold more cast iron tubs than it did steel tubs?

A. I can't recall it. I can't answer that.

464 Q. Are you able to state, Mr. Greenfield, approximately how many bath tubs of all types Mars Supply sold during the year 1957?

A. No, I can't.

Q. You have no idea?

A. No.

Q. You know you did sell some bath tubs?

A. Yes.

Q. If I were to tell you that you sold 400 cast iron tubs during the year 1957, would you quarrel with that statement?

A. If you say so, no.

Q. If that were the fact, would you be able to form an opinion as to whether or not your cast iron tub sales exceeded your steel tub sales?

A. If you can show it to me I can go along with it.

Q. In other words, you sold, if you sold 400 or more cast iron tubs you believe the majority of your sales of all types was in cast iron; is that correct?

A. Yes, sir.

Q. But as far as your advertising went in 1957 the bulk of the tubs you advertised were steel, were they not?

A. Yes.

465 Q. On direct examination, Mr. Greenfield, you stated that the first four manufacturers were, with regard to volume in the industry—Strike that, please. With regard to quality in the industry were American Standard, Kohler, and then I believe you puf either Eljer or Crane; is that correct?

A. I wasn't describing them as quality.

Q. Were you describing them as—

A. As firms in existence; I didn't say quality.

Q. You are familiar with American Standard Company, are you not?

A. I am familiar with the name.

Q. Do you know whether that is the largest company in the United States as far as sales of plumbing fixtures are concerned?

Mr. Lipnick: Objection.

Hearing Examiner Buttle: Read the question, please.

(The pending question was read.)

Hearing Examiner Buttle: Objection sustained.

By Mr. Fruchterman:

Q. Are you familiar with the prices at which American Standard plumbing fixtures are sold to consumers in the Philadelphia-Camden area?

Mr. Lipnick: Objection.

466 The Witness: No.

Hearing Examiner Buttle: He says no.

By Mr. Fruchterman:

Q. Would your answer be the same for the year 1957?

A. I do not know what their prices were then.

Q. Do you know what their prices were in '57 as far as wholesalers were concerned?

Mr. Lipnick: If Your Honor please, I object to this line of testimony. I think it is immaterial.

Hearing Examiner Buttle: The witness says he doesn't know. Of course, I don't know what it is leading up to. I would say that you are getting pretty far afield, aren't you, Mr. Fruchterman?

Mr. Fruchterman: Sir, I will endeavor to connect this up.

Hearing Examiner Buttle: All right.

By Mr. Fruchterman:

Q. Now, you don't know what those prices were, but are you able to state whether in 1957 American Standard products commanded a premium over Universal-Rundle products? That is as far as prices are concerned?

A. I never sold American Standard then so I don't know what their prices were.

Q. Did any of your customers ever mention American Standard?

467 A. Yes, they did.

Q. From their comments would they indicate to you that they considered American Standard a high quality line?

Mr. Lipnick: Objection. If Your Honor please, if Mr. Fruchterman would care to ask what the comments were I would not object to the question, but the way this question is framed now I think it is completely improper.

Hearing Examiner Buttle: Well, your contention is that this is new matter?

Mr. Lipnick: No, sir, I understand that it is cross-examination and I don't think it is new matter, however, we are getting back into the field of are we asking him what information he got on which he acted and with which he formed opinions, or are we asking him what the consumers thought.

Hearing Examiner Buttle: Well, I would assume and, as a matter of fact, of course I am only allowing this for the purpose of establishing or interrogating the witness with regard to the information that he received, which was the basis upon which he acted, and it is in that light that I will consider the evidence, as I have heretofore indicated on direct; and you may assume that as well as Mr. Fruchterman.

By Mr. Fruchterman:

Q. Do you recall in your conversations with customers back in 1957 whether the name American Standard 468 was ever mentioned?

A. Yes, it was.

Q. In what regard was it mentioned?

A. Well, they asked me if we had American Standard fixtures to show them and, inasmuch as we didn't have it we just said we didn't have it and that was it.

Q. Did you receive more requests to be shown American Standard from your customers than you did to be shown Eljer?

A. Yes.

Q. More requests to be shown American Standard than you did to be shown Crane?

A. Yes.

Q. More requests for American Standard than any other manufacturer's brand; is that correct?

A. Yes.

* * * * *

484 Q. Mr. Greenfield, back in 1957 you purchased certain quantities of Universal-Rundle fixtures directly from Universal-Rundle in carload quantities, did you not? When I say you, I mean Mars Supply.

A. Say that again.

Q. Back in 1957 you purchased certain quantities of your requirements for plumbing fixtures from Universal-Rundle in carload quantities, did you not?

A. Yes, we did.

Q. And on other occasions you did not buy in carload but ordered on a telephone in and pick up basis, did you not?

A. Yes, we did.

* * * * *

485 Q. Now, Mr. Greenfield, I call your attention to a copy of Commission's Exhibit Number 85-D. Will you look at that invoice and tell me whether or not that is part of a carload shipment from Universal-Rundle or whether that was on a pick-up basis?

A. This is on a pick-up basis.

Q. Now, if the prices for the items listed on that invoice, Commission's Exhibit Number 85-D, correspond to the wholesaler's net list price in Commission's Exhibit—

486 Hearing Examiner Buttle: Did you say if it does correspond?

Mr. Fruchterman: Yes.

By Mr. Fruchterman:

Q. Well, if it corresponds to the price listed in Universal-Rundle's 1957 wholesale price book, you wouldn't be getting any discount, would you?

A. No.

* * * * *

489 Q. If the list price for the Castle reverse trap
490 combination is $21.45—Strike that. If the list price for the Castle combination during 1957 was $25.25 and the price you were paying on Commission's Exhibit 85-Z-64 was $21.45, that would indicate that you were getting a discount, would it not?

A. That is right.

Q. And that is a discount for a truckload price, is it not?

A. That is right.

Hearing Examiner Buttle: Well, that is the question that you should have put first before you invited my attention to it, but all right.

By Mr. Fruchterman:

Q. Do you recall now the amount of discount which you received on truckloads?

A. No.

Q. In 1957?

A. No.

Q. But you would be able to work it out on a specified percentage based on the invoices and the list prices; is that right?

A. That is right.

Q. Now, on occasions when you did not order in truckload quantities the result was that you had to pay a higher price to Universal-Rundle for the articles which you
491 bought; is that correct?

A. That is right.

Q. Now, as a man familiar with purchasing from large supply companies and experienced in the business, don't you try to buy at the lowest price you possibly can?

A. Yes, we do.

Q. Why is it that during 1957 many of your purchases were made on a pick-up basis at the full list price when you had a truckload discount available to you?

A. Not at list price.

Q. At the wholesaler's net price rather. Why did you pay the wholesaler's net price on so many occasions or on a number of occasions in 1957 when you had this truckload discount available to you?

A. Because in other words if we would just have ordered a truckload of merchandise in the next couple of days we would have a lot of items that we may not have ordered in our truckload shipment. It wouldn't pay to order another truckload in order to get one or two items when we were short.

Q. Wasn't the fact that you, if you have items which you can turn over rapidly it is worth your while to store

them and sell them, but other items which are not sold as rapidly the cost of storing them exceeds the value of the discount?

492 A. That is right.

Hearing Examiner Buttle: That is what he said yesterday.

Mr. McAleer: He didn't testify yesterday.

By Mr. Fruchterman:

Q. Do you know the discounts ran as high as 10 percent back in 1957?

A. I don't know.

Q. Do you know they ran at least as high as 5 percent?

A. They probably did.

Q. And probably as high as 10 percent; is that your best recollection?

Mr. Lipnick: Objection. If your Honor please, I object to this last question on the ground that the witness—

Hearing Examiner Buttle: Well, there seemed to be several.

Mr. Lipnick: No, there was just one that wasn't answered, which is the one I am objecting to; and that is on the ground that it is beyond the proper scope of cross-examination at this point because the witness has already completely given Mr. Fruchterman the information this question calls for; completely. He stated specifically that he doesn't remember, and he stated specifically that it could be computed from his invoices; and I don't see how Mr. Fruchterman can go on badgering this man any further.

493 Hearing Examiner Buttle: Read the question. (The series of questions on page 492 by Mr. Fruchterman and the answers thereto to the objection by Mr. Lipnick were read.)

Hearing Examiner Buttle: You can strike it all. It is based on probability only. I will allow you to pursue it

and find out what it was, but the witness can state with reasonable certainty as to the possibility of it and probability of it. Let it be stricken.

By Mr. Fruchterman:

Q. Are you unable to recall the amount of that discount?

A. Yes, I am.

Q. But regardless of what the amount was, it is your testimony that at times when you ordered direct from Universal-Rundle, rather in pick-up quantities, small quantities to be picked up it was just as economical for you to do that even though you didn't get the discount because you didn't have to warehouse them?

Hearing Examiner Buttle: Oh, well, he said so before. This is cumulative.

* * * * *

494 By Mr. McAleer:

Q. Mr. Greenfield, have you been interviewed by a representative of the Federal Trade Commission concerning this matter prior to the trial date and prior to your testimony here today?

A. Yes, I have.

Q. When? Can you give us an approximate date when you were first interviewed by a Federal Trade Commission's representative?

A. I don't know the exact date.

Q. Would you give us your best estimate?

A. I would say about 4 or 5 years ago.

Q. Were you subsequently interviewed by a Federal
495 Trade Commission investigator after the initial investigation?

A. Yes, I was.

Q. Could you give me your best recollection when it was?

A. Three years ago.

Q. Have you been interviewed by a Federal Trade Commission Investigator within the past year with respect to this Universal-Rundle proceeding?

A. Not the past year.

Q. Did you in prior interviews with the Federal Trade Commission's investigators cover the same matter which was elicited by your testimony on direct examination today?

A. Oh, more or less. I would say yes. The main thing was they wanted to see our records, which we showed them.

Q. Did they obtain any copies of your records, sir?

A. The records did not leave our office, but they had about four or five years ago a gentlemen in our office for two days looking over the records.

Q. Then I take it to be your testimony, Mr. Greenfield, that you have not been called upon by a Federal Trade Commission investigator with respect to the Universal-Rundle proceedings since October of last year, would you say?

A. Somewhere around that.

496 Mr. McAleer: I have no further questions, Mr. Buttle.

* * * * *

By Mr. Lipnick:

Q. Mr. Greenfield, do you consider me to be a Federal Trade Commission Investigator?

A. I wouldn't know if you are or not.

Q. You don't know?

A. You never introduced yourself to me as such.

Q. Did the investigators who interviewed you, when you told Mr. McAleer that you had been interviewed at various times in the past, did they introduce themselves to you as Federal Trade Commission Investigators?

A. I believe they did.

Q. And in answering Mr. McAleer's question with respect to whether or not you had been interviewed in the past year in connection with this case, did you have reference to people who had either come to your place of business or had specifically stated that they were Commission Investigators?

A. Yes.

Q. Mr. Greenfield, who owns the stock of Mars Supply?

497 A. Sol Greenfield and Arus Greenfield.

Q. Sol Greenfield is you and Arus is your brother?

A. Yes.

Q. And do you own all the stock between you?

A. Yes.

Q. When Mars Supply Company makes a profit do you receive dividends on your stock?

A. Yes.

Q. Are you paid a salary as an officer of Mars Supply Company?

A. Yes.

Q. Have you ever been paid a bonus?

A. Yes.

* * * * *

500 Q. Do you always sell bathroom fixtures in three piece sets?

A. No, sometimes we sell individual pieces.

Q. When you sell three piece sets are those three piece sets always composed of three pieces made by the same manufacturer?

A. No.

Q. Do you consider, sir, that it is the primary responsibility of your salesmen to sell plumbing fixtures regardless of whether they are in the middle, top or bottom of

501 the line?

A. They sell plumbing fixtures regardless.

* * * * *

Q. Are you familiar with the method used by Universal-Rundle in determining freight allowances in 1957?

501-A Mr. Fruchterman: Objection, Your Honor. As I understand the direct examination—I mean the re-direct examination—it is merely to clarify points raised.

Mr. Lipnick: This is directly related to the questions on the cross.

Mr. Fruchterman: He is talking of freight. That is a payment to a carrier for transporting goods; that is what it means. If that is what he has in mind that was not brought up.

Hearing Examiner Buttle: Well, of course, it is still within my discretion to allow it and I will allow it.

Mr. Lipnick: I think it will be clear that it is directly related to cross-examination.

Hearing Examiner Buttle: Regardless of whether it is I am allowing it.

By Mr. Lipnick: When you referred to the discount which you received for buying in carload units, Mr. Greenfield, did you get that pursuant to a freight allowance or was that some other discount that you got for buying in carloads?

A. We bought with full freight allowance.

Q. Did you ever get any discount from Universal-Rundle other than a freight allowance?

Mr. Fruchterman: Your Honor, we are going to object.

502 Hearing Examiner Buttle: On what ground?

Mr. Fruchterman: Because he is talking about two different things and freight has a precise meaning, which he should know. The invoice has been introduced in evidence and it covers the precise point. It states what the freight allowance is.

Hearing Examiner Buttle: The invoice may state it but, as a matter of fact, this witness was asked whether he received it. Proceed.

By Mr. Lipnick:

Q. In 1957, sir, did you receive any special deals or allowances or discounts or any arrangement which resulted in Mars Supply Company with respect to any of its purchasers paying a net price lower than the regular wholesaler net price? Did you receive any of these arrangements for any reason other than as a freight allowance?

Mr. Fruchterman: Objection, Your Honor. It is beyond the scope.

Hearing Examiner Buttle: I will allow it. It may be beyond the scope but I will allow it because on redirect, as a matter of fact, it is perfectly proper to allow counsel to adduce additional evidence within the discretion of the Hearing Examiner. All right.

The Witness: I don't know. I just don't understand that question.

503 Mr. Lipnick: I will withdraw the question and rephrase it in that case, sir.

By Mr. Lipnick:

Q. Do you recall being shown an invoice while you were being cross-examined and in which you stated that that invoice was for part of a truckload purchase and that the price on the invoice was lower than the price listed on the wholesaler's price book because you bought that truckload and, therefore, you were given a special discount?

A. Yes.

Q. When you purchased in truckloads did you pick up the merchandise or was it delivered to you?

A. It was delivered to us.

Q. When it was delivered to you who paid the carrier? Was it pre-paid or did you pay?

A. Sometimes full freight allowance if we paid it we were reimbursed. If they paid it then we weren't.

Q. Was that shown on the invoice?

A. Yes.

Q. How was it shown on the invoice?

A. It was just stated. Now, various companies have various ways of doing it.

Q. I am asking about Universal-Rundle, sir.

A. I believe they paid in advance.

Q. Well now, if you received a shipment of a truckload and the invoice price to you on that shipment is lower
504 per unit than the price in the wholesaler's price book, does that reflect a special discount which you were given for buying in truckload quantities which was something other than a freight allowance?

A. That is right.

Q. And did you in addition to the one invoice which Mr. Fruchterman showed you, did you receive other special deals or special allowances for buying in quantity or for other reasons in 1957 other than freight allowances?

A. Truckload lots, yes.

Q. Were there occasions in 1957, sir, when you were permitted to purchase merchandise by Universal-Rundle Corporation at prices lower than the wholesaler's net price as stated in price books?

A. I don't recall other than freight load allowances.

Hearing Examiner Buttle: Well, freight load allowance was the only discount that you got; is that what you are telling us?

The Witness: Truckload is different than freight allowances.

Hearing Examiner Buttle: What allowances did you get, that is what I am trying to find out, if any?

The Witness: What was our real discount off the price sheet for truckload lots?

Hearing Examiner Buttle: Yes.

505 The Witness: I can't remember right off hand.

Hearing Examiner Buttle: Well, with regard to the invoice that you were shown it would appear that you re-

ceived the item at an amount that was less than the wholesaler's price. Was that differential a freight allowance or what was it? You remember the invoice, don't you?

The Witness: Yes.

Hearing Examiner Buttle: What was that, what was the difference? What did that represent?

The Witness: The invoice shown to me had a lower price than the price sheet, then on the bottom of the sheet, full trade allowance.

Hearing Examiner Buttle: The difference was the freight allowed? What was the difference the freight allowed, do you know?

The Witness: No, the difference was not the freight allowed, the difference was it was a discount.

By Mr. Lipnick:

Q. And that was a discount given to you because you bought that certain quantity?

A. Truckload lots.

Q. Have you been interviewed prior to testifying here today by any attorney representing the Respondent in this matter, sir?

506 A. Yes.

Q. And how often were you interviewed by them?

A. Just once.

Q. When was that, sir?

A. A little over a year ago.

Q. Excluding any conversations you may have had with counsel yesterday, was your most recent interview by a representative of the Federal Trade Commission in connection with this case or a representative of the Respondent?

A. Representative of the Respondent.

* * * * *

507 Now, your Honor, I would like to invite your attention to the back cover of Commission's Exhibit Number

79 and therein is a full explanation of the freight policy of Universal-Rundle Company.

Hearing Examiner Buttle: Well, let me see it right now, if I may, and I will remember it.

Mr. Fruchterman: This is a copy of that document, sir.

Hearing Examiner Buttle: That is all right.

All right, that will be a help to me.

By Mr. Fruchterman:

Q. Mr. Greenfield, during 1957 you sold to Gerber China, did you not?

A. Yes.

* * * * *

511 PROCEEDINGS.

Hearing Examiner Buttle: Let the record show that we have convened in the matter of Universal-Rundle Corporation, Docket No. 8070, at 9:38 a.m. on October 18, 1962, in Court Room No. 7, United States Court House, Philadelphia, Pennsylvania.

* * * * *

RUBIN TEPPER was thereupon called as a witness for the Commission and, having been previously duly sworn, testified as follows:

Hearing Examiner Buttle: Give your name and address to the Reporter, please.

The Witness: Rubin Tepper, 92 16½ Burbank Road, Philadelphia.

Direct Examination by Mr. Depro.

Q. Mr. Tepper, what is your occupation?

A. Manager of the Richmond Plumbing Supply.

512 Hearing Examiner Buttle: I should say I asked—I should put on the record that he was sworn. He was sworn last night.

By Mr. Depro:

Q. Where is the Richmond Plumbing Supply located?

A. 3114 Richmond Street, Philadelphia.

Q. And what is the nature of the business of Richmond?

A. We are a plumbing and heating supply house, basically heating.

Q. Plumbing and heating supply, basically heating.

A. Yes.

Q. Now, do you have any other locations than that one in Philadelphia?

A. No. That is their only building.

Q. What kind of a business association is the Richmond Plumbing?

A. It is a partnership.

Q. Partnership?

A. Yes.

Q. Are you a partner?

A. No, I am not.

Q. Who are the partners in the—

A. My father, Abraham Tepper, and Frank Malamut.

Q. How long has the partnership business of the Richmond Plumbing Supply been in existence?

513 A. 32 years.

Q. Has it been in Philadelphia all that time?

A. That is right.

Q. Now, how long have you been with the partnership?

A. Thirty years.

Q. And how long have you been manager?

A. That same time.

Q. Thirty years?

A. That is right.

Q. Do you have a warehouse at the same address?

A. We also have a warehouse around the corner on Clearfield Street.

Q. At another address.

A. At another address.

Q. I see. Now, in the course of your purchasing of plumbing supplies, plumbing fixtures, have you purchased —from whom did you purchase in 1957?

A. I believe from Universal-Rundle.

Q. Universal-Rundle?

Mr. McAleer: I'm sorry. I didn't hear that.

The Witness: Universal-Rundle.

By Mr. Depro:

Q. Was there anyone else that you purchased from in 1957, sir?

514 A. Most likely Richmond Enamelware.

Hearing Examiner Buttle: Is this most likely?

The Witness: Yes.

Hearing Examiner Buttle: Well, did you?

The Witness: It is hard to recall then. That is five years ago.

By Mr. Depro:

Q. Was there any—

A. I would say yes on that.

Q. —that you purchased from those two, at least?

A. Yes.

Q. Was there anyone else?

A. No.

Q. Now, to whom did you sell, Mr. Tepper? What classes or class of customers?

A. Mainly to heating—mainly to contractors, plumbers.

Q. And your plumbing equipment you sell to the contractors and plumbers, is that right?

A. What is that?

Q. I say, your plumbing supply—

Mr. McAleer: I object, Your Honor. I believe he is leading the witness.

Hearing Examiner Buttle: Yes. Sustained.

Mr. Depro: I was just trying to get a clarification of that last answer.

515 Hearing Examiner Buttle: You can reframe the question.

By Mr. Depro:

Q. What kind of contractors did you mean?

A. Mainly plumbing contractors.

Q. Plumbing contractors.

A. That is right.

Q. And has that been so for 1957? Was that so in 1957?

A. Right.

Q. Now, do you maintain a retail store at the premises?

A. Yes.

Q. Do you sell to consumers who might come in?

A. Yes, we do.

Q. Are you a plumber? You are not a plumber yourself.

A. No.

Q. Now, is all of your plumbing equipment sold installed by registered plumbers, do you know?

A. If they are all installed by registered plumbers?

Q. Yes.

A. That we don't know.

Q. Is there a code—there is a code, is there not?

A. There is a code in Philadelphia.

Q. That requires licensed plumbers.

A. That is right.

Q. To install the plumbing fixtures, is that right?

516 Now, do you—are you familiar with the Girard Supply Corporation in Philadelphia?

A. Yes.

Q. Do they sell plumbing fixtures, do you know?

A. They are not in business now.

Q. Well, in 1957.

A. They were, yes. They did sell plumbing fixtures.

Q. I see. Now, did they sell to the same class of customers to whom you sold or endeavored to sell?

A. Yes.

Q. I will ask you the same question with respect to Hajoca Corporation, Philadelphia.

A. Yes.

Q. Black and Brown?

A. Yes.

Q. For Nat Friedman & Sons?

A. Right.

Q. Now, are there any others in the plumbing supply business selling at wholesale in the Philadelphia area that you know of that were selling in 1957 along the time that you were selling?

A. Everybody—

Mr. McAleer: I object, Your Honor. Undoubtedly there were many wholesalers of plumbing fixtures in the Philadelphia-Camden area in 1957. I can't see the rele-

517 vancy of whether wholesalers who may have been carrying another manufacturer's plumbing fixtures—I can't see how that is relevant in any way in this proceeding.

Mr. Depro: This is an endeavor, Mr. Examiner, to avoid asking him with whom he competes. I think that is a mixed question of law and fact, and to get to the answer with the least—

Hearing Examiner Buttle: Yes. I will allow it.

By Mr. Depro:

Q. Could you answer the question, or would you want it—

A. Will you please repeat that question.

Hearing Examiner Buttle: Read the question, Miss Taylor.

(The Reporter read the question as follows:

"Question: Now, are there any others in the plumbing supply business selling at wholesale in the Philadelphia area that you know of that were selling in 1957 along the time that you were selling?")

The Witness: Yes. There were quite a few. Mentioning names?

By Mr. Depro:

Q. Could you mention some, then?

A. Frankford Plumbing Supply, Fisher Plumbing Supply, Cobbs Creek Plumbing Supply. Every plumbing 518 supply company in Philadelphia handles plumbing fixtures.

Q. Would you say, Mr. Tepper, that price was a factor in the business of selling plumbing supplies?

A. Yes, sir.

Q. Is it an important factor?

A. It is an important factor.

Q. Was it in 1957?

A. Yes.

Q. Now, are you familiar by observation or otherwise with the products—plumbing supply products of other manufacturers than Universal-Rundle?

A. Yes.

Q. Would you—are you familiar with the products of American Standard?

A. To a slight degree.

Q. Have you—what do you mean "to a slight degree"?

A. I have never sold many American Standard products.

Q. Did you sell any in 1957?

A. I believe so.

Mr. McAleer: I object, Your Honor. I believe that the witness can testify to what he actually knows, not what he believes.

Hearing Examiner Buttle: Sustained, as to form only.

By Mr. Depro:

519 Q. What did you mean by—

Hearing Examiner Buttle: The witness said he believed. What do you mean?

The Witness: I will explain that. Every plumbing supply house has his customers that will favor certain supply houses for most of their business. A plumber that we do business with may come in and say his customer wants American Standard fixtures and will take no other. We will endeavor to get American Standard fixtures for him. In other words, we would not say to that plumber that we do not handle American Standard, we can't sell it to you. And that applies to every other manufacturer in the field.

Now, as a rule, as a rule—

Hearing Examiner Buttle: Do you know that as a result of your experience? Is it a fact?

The Witness: It is a fact. You see, you cannot handle every manufacturer's line of enamelware. In the first place, you can't get a distributorship from every manufacturer. You may handle two for the most. Yet every jobber will in turn sell any make that his customer in turn wants by buying through other jobbers in order to satisfy his customer. In other words, I don't want my customer to go to another supply house to buy American-Standard. He in turn might stay with that other supply house.

Therefore, I will manage to get that item for him
520 and deliver it.

By Mr. Depro:

Q. And how would you purchase an item like that from American?

A. I would buy it from a distributor of American Standard.

Q. From a distributor. Now, would the same thing—strike that, please.

Have you also on occasion in order to satisfy the demands of one of your customers or one or more of your customers obtained plumbing supplies of some of the other manufacturers in addition to American Standard?

A. We have.

Q. Could you name some of the others?

A. Kohler, Eljer, Rundle we bought direct at that time, American Standard. That is about the extent.

Q. Have you ever purchased any from a jobber of Crane?

A. Yes, we have. We have bought from Crane.

Q. Now, in 1957 you say you purchased direct from Universal-Rundle?

A. Yes.

Q. Did they deliver to you or did you pick up?

A. We picked up from their Camden plants.

Q. And what products of Rundle did you handle in 1957?

A. Bathtubs, toilets, lavatories, kitchen sinks and certain brass goods.

521 Q. Now, did these products that you purchased from Rundle in 1957 come with the fittings installed or were they just plain?

A. Plain.

Q. And would you—do you stock fittings in your business?

A. We do.

Q. Do you stock fittings of more than one manufacturer?

A. Yes.

Q. Would the fittings that you stock be interchangeable among the products of American Standard, Kohler, Crane?

A. Yes.

Q. Universal-Rundle?

A. Yes.

Q. Was that so in 1957?

A. Yes.

Q. Mr. Tepper, would any differences in the designs of the products that you have purchased and resold in the plumbing fixture fields, bathroom fixtures, for example, have any—make any difference in the usefulness of the product?

A. No.

• • • • •

525 Q. From your experience in this business, some thirty years, and as manager of this Richmond Plumbing Supply, how would you describe the relative merits of the products of these four or five companies that you named, American Standard, Kohler, Crane, Eljer and Universal-Rundle?

526 Hearing Examiner Buttle: You mean insofar as the quality of them is concerned?

Mr. Depro: Yes, sir.

The Witness: I believe they are equal. As far as type of toilet to any other type of toilet or enamelware of any fixture to any other type of fixture, as far as dollars and cents and the type and size.

By Mr. Depro:

Q. Was that so in 1957?

A. Yes.

• • • • •

Q. Do these other manufacturers endeavor to sell through salesmen to the trade, do you know?

A. Most manufacturers sell through their own salesmen.

Q. Have the salesmen of these companies that you have named, these manufacturers that you have named, called on you from time to time?

A. Only one manufacturer, Richmond Radiator Company.

Q. Richmond?

A. Right.

Q. Could you tell us the approximate total gross sales of your business in 1957 in round figures?

A. Of our entire business?

Q. Yes.

A. About $100,000.

527 Q. And your—strike that.

Now, in the operation of your business, do you make it a practice or is it a policy of your company or your firm to take advantage of the cash discounts?

A. We do.

Q. Is it an important factor in the operations of your business?

A. It certainly is.

Q. Would you say it was essential to the difference between a profit and loss—

Mr. McAleer: I object, Mr. Buttle, as leading the witness.

Mr. Depro: That is not leading him at all. He has not—

Mr. Fruchterman: He is putting the words in his mouth, your Honor.

Mr. Depro: He can say whether it is essential or not, Mr. Examiner. I don't see that that is leading.

Hearing Examiner Buttle: I suppose any financial benefit you get by way of discounts or otherwise I assume is important. It is perhaps the substantiality of it where there may be some question on it, but I rather doubt if I would have to ask witnesses that. Anyone that has a price advan-

tage has an advantage insofar as profits are concerned. I think that is an elemental conclusion I would have to
528 draw without the production of evidence. Substantiality of it is a different thing. The substantiality is a different matter.

Go ahead.

By Mr. Depro:

Q. Well, what is the rate of discount, cash discount, that you normally receive?

A. Generally two per cent.

* * * * *

By Mr. Depro:

Q. Mr. Tepper, could you tell us what effect, if any, the two per cent discount or the lack of that discount would have on your ability to compete?

A. I don't believe it would make any difference as far as the cash discount. Everybody gives you a cash discount.

Q. But I am saying, if you didn't get that cash discount, what effect would that have, if any, on your ability—

A. It would give us that much—.

Mr. McAleer: I think, your Honor, the witness has
529 answered the question. So I object to this second—

Mr. Depro: He said everybody.

Hearing Examiner Buttle: This was a new question and it clarifies the first question. The witness made it clear that it wouldn't have any effect because others receive the two per cent cash discount. Now what is being asked is what would be the effect if he didn't get the two per cent discount.

Mr. Depro: And others did.

Mr. McAleer: I believe, Mr. Buttle, it is a hypothetical question, no foundation laid.

Hearing Examiner Buttle: Well, as a matter of fact, he is being asked this question on the basis of his being able to

render an opinion as a result of his experience which requires a certain amount of expertise. So I will permit the question. I think sufficient foundation has been established for this sort of question.

By Mr. Depro:

Q. Do you know the question?

A. Yes. It would give us a smaller margin of profit, not having the two per cent discount.

Q. It would reduce your profits?

A. That is right.

Q. Is the margin of profit on your plumbing fixtures a small—

530 Mr. McAleer: I object.

By Mr. Depro:

Q. —or large—

Mr. McAleer: He is leading the witness there.

By Mr. Depro:

Q. What is the margin of profit?

Mr. McAleer: Putting words right into the witness' mouth.

By Mr. Depro:

Q. I will withdraw that question and ask what is the margin of profit on plumbing fixtures?

A. It varies between 10 and 15 per cent.

Q. Is there—strike that.

Do you ever have business come to you or presented to you, offered to you, where the margin is less than 10 per cent?

Mr. McAleer: I object, your Honor.

Hearing Examiner Buttle: What is the point in that? I am a little bit lost here.

Mr. Depro: Well, he said that the profit varied, the

margin varied between 10 and 15 per cent. I will withdraw that question.

Hearing Examiner Buttle: And that is that. So I don't see what difference it makes. Objection is sustained.

By Mr. Depro:

531 Q. What do you mean by margin, Mr. Tepper? Is that your gross margin or net margin or just what is it?

A. That would be our gross margin.

Q. Your gross, and out of that you—out of that would have to come what?

A. All our expenses.

Q. Including your taxes?

A. Yes.

Q. Do you sell your bathroom fixtures in sets of three generally?

A. As a rule.

Q. Can you include in a bathroom set the products of different manufacturers and match them?

A. We generally do.

Q. Can you match any particular color better than any other color?

A. I do not understand your question.

Q. I mean can you put, for example, a Kohler lavatory in with an American Standard tub and toilet in the white and match them?

A. In white, yes.

Q. You can do that?

A. Only.

Q. Have you done that?

A. Yes.

532 Q. Did you do that in 1957, do you recall?

A. Yes.

Q. And you said only. What did you mean by that?

A. White is the only color that would go together.

Q. You cannot match the others?

A. You cannot match a blue of any other company to match the same blue or other colors.

Q. I see.

A. You can only do that in white.

Q. I see.

By Mr. McAleer:

Q. Mr. Tepper, you testified that you had a retail store at your place of business, is that correct?

A. Yes.

Q. Do you maintain any displays of plumbing fixtures in your retail store?

A. We do not.

Q. In your retail store do you sell any substantial amount of plumbing fixtures directly to consumers?

A. Very little.

533 Q. In 1957, Mr. Tepper, do you know how many bathtubs you purchased from Universal-Rundle Corporation?

A. No.

Q. Would it be correct if I told you that Universal-Rundle sold you only nine bathtubs in 1957?

A. It is possible.

Q. Do you know how many kitchen sinks, cast iron kitchen sinks, you purchased in 1957?

A. No.

Q. Did you purchase kitchen sinks from any source other than Universal-Rundle in 1957?

A. I cannot tell you honestly. I do not know.

Q. Would it be correct if I told you that you purchased only two kitchen sinks from Universal-Rundle in 1957?

A. I would believe it could be correct.

Q. Do you know how many vitreous china lavatories you may have purchased from Universal-Rundle in 1957?

A. No.

Q. Did you purchase any?

A. I believe we did.

Q. Mr. Tepper, you testified that your business is basically that of selling heating supplies.

A. Right.

Q. You have also testified that your total sales in 1957 were approximately $100,000.

534 A. Correct.

Q. Of that $100,000, Mr. Tepper, what percentage of those sales would be represented in sales of—would be represented by sales of Universal-Rundle fixtures?

A. Our sales of plumbing material would run basically about five per cent of our total business. Of what we have sold in Universal-Rundle—

Q. In 1957.

A. Of that five per cent, possibly two per cent of that would apply.

Q. Would that include trim that you purchased from Universal-Rundle?

A. Yes.

Q. What per cent of the two per cent would be trim, Mr. Tepper?

A. Maybe a tenth of two per cent.

Q. Mr. Tepper, would it be correct to state that you sell plumbing fixtures only as an accommodation to your plumbers in connection with their selling heating equipment?

A. That is right.

Q. Mr. Tepper, is the reason you take the two per cent discount basically because if you do not take that discount, your lines of credit will be jeopardized?

A. No. That represents a margin of profit without moving a truck or doing any additional paperwork or

535 handling, and two per cent in our line, which is very competitive, is a big item.

Q. Mr. Tepper, in buying heating equipment other than plumbing fixtures, do you usually buy in truckload quantities?

A. Yes.

Q. You maintain a warehouse, do you?

A. We do.

Q. Do you obtain discounts on heating equipment that you buy in truckload quantities?

A. All plumbing materials—

Mr. Depro: I am going to object to that, Mr. Examiner, as being outside—there is no issue on heating equipment here. And trade discounts—I did ask him about cash discounts, but I am going to object to it as being irrelevant to the issues in this case.

Hearing Examiner Buttle: What about that, Mr. McAleer?

Mr. McAleer: I think he has opened the door when he got into the question of discounts, Mr. Buttle.

Mr. Depro: I asked for cash discounts expressly and I didn't ask anything about trade discounts or anything pertaining to his heating business.

Mr. McAleer: Mr. Buttle, may I point this out, that the Commission's theory as I understand it is that there have been discriminations in price between trade customers
536 and that the discriminations in price between trade customers were represented by discounts that were available to some customers and not available to others. I would like to establish whether or not Mr. Tepper availed himself of truckload discounts on those products that he sold in substantial quantities, namely, heating equipment.

Mr. Depro: What difference does it make whether he did or not, Mr. Examiner, insofar as the issue of whether a small margin is substantial or insubstantial or inconsequential, or whether this man has been injured in any way?

Hearing Examiner Buttle: Whether what?

Mr. Depro: Whether this man has been injured in any way by the price discriminations alleged. Not in heating equipment. Not in heating but in the plumbing fixtures. Universal-Rundle doesn't sell anything as I understand in the heating field.

Hearing Examiner Buttle: Well, is there anything in the complaint that one contemplates that heating equipment is in issue?

Mr. Depro: No. No, sir.

Hearing Examiner Buttle: Is that right?

Mr. McAleer: That is correct, Mr. Buttle, but I still maintain that Commission counsel is taking the position that when a discount is available to one of Universal-
537 Rundle's trade customers and not available to another, that the differential reflected in those discounts may result in a competitive effect required by the statute.

Hearing Examiner Buttle: Yes. Well, of course, that is, of course, the position the Commission has been taking itself in some of these cases, some of its cases which haven't been resolved yet, one of which is before me. So I will allow it.

Mr. McAleer: I beg your pardon?

Hearing Examiner Buttle: I will allow the question.

Mr. McAleer: Would you read the question, Miss Reporter?

Hearing Examiner Buttle: This witness has just testified, Mr. Depro, in fact he wasn't asked the question but he voluntarily said that their line was highly competitive. So that is another thing that brings it into that issue.

All right. Go ahead.

(The Reporter read the question as follows: "Question: Do you obtain discounts on heating equipment that you buy in truckload quantities?")

The Witness: Yes, we do.

By Mr. McAleer:

Q. Mr. Tepper, are you familiar with the prices that were in effect for Universal- Rundle fixtures in 1957?

538 A. Do you mean discounts?

Q. I am asking you whether or not you were familiar with the prices for Universal-Rundle fixtures in 1957.

A. How do you mean that?

Q. Did you know that a truckload discount was available from Universal-Rundle in 1957?

A. Yes.

Q. Why did you not purchase in truckload quantities?

Mr. Depro: I object, Mr. Examiner. What difference does it make why he didn't purchase in truckloads.

Hearing Examiner Buttle: I will permit it. Go ahead.

The Witness: We didn't sell enough material to warrant being a—buying in larger quantities, nor did we have the warehouse facilities.

By Mr. McAleer:

Q. Then it is true, Mr. Tepper, that the added discount that was available under truckload—when you purchased in truckload quantities was not worth the cost to you of buying in those quantities because you would have to have inventories and warehoused them, is that correct?

A. Right.

Mr. Depro: I object as calling for a conclusion and it is immaterial to the issues.

Hearing Examiner Buttle: Well, of course, a con-
539 clusion is improper as far as direct examination is concerned. There may be considerable latitude in cross-examination in regard to asking almost any question that may relate not only to the facts but to the probative weight of the evidence given by the witness or his credibility.

Mr. Depro: It is a matter of argument, though, Mr. Examiner, it seems to me. He has stated the fact as to what he did.

Hearing Examiner Buttle: I suppose in some respects it is argumentative. The witness stated that he didn't have sufficient volume of business to buy in truckload quantities, and now he is being asked a question in a different way. So that his answer may be given from a different prospective. But I am reserving all this. I will allow the question and I will allow the answer, but read the answer to me again.

(The Reporter read the record as follows:

"Question: Then it is true, Mr. Tepper, that the added discount that was available under truckload—when you purchased in truckload quantities was not worth the cost to you of buying in those quantities because you would have to hav inventories and warehoused them, is that correct?

"Answer: Right.")

540 Hearing Examiner Buttle: In other words, you didn't sell in sufficient quantities.

The Witness: That is right.

Hearing Examiner Buttle: As the basis upon which you could buy in that volume, is that right?

The Witness: That is right. It was available to us. We didn't want to take advantage of it.

Hearing Examiner Buttle: You couldn't afford to take advantage of it.

The Witness: Or the space.

Hearing Examiner Buttle: Or the space. All right. Let's proceed.

By Mr. McAleer:

Q. Mr. Tepper, you on direct examination listed a number of wholesalers with whom you competed in 1957. Among those that you listed were Hajoca Corporation, is that correct?

A. Yes, sir.

Q. How do you know that you competed with Hajoca Corporation?

A. Because your plumbers will tell you if you are out of line that they can buy a certain product at a certain place for so much money if you are higher.

Q. Where were your plumbers located that you were selling to in 1957?

A. Basically in the Frankford area, Richmond area,
541 the northeast particularly.

Hearing Examiner Buttle: The northeast of what?

The Witness: Philadelphia.

By Mr McAleer:

Q. Could you give me some of the names of some of the plumbers that you sold Universal-Rundle fixtures to in 1957, sir?

A. Yes. Jerry McColagan.

Mr. Depro: What was that name?

The Witness: Jerry McColagan.

By Mr. McAleer:

Q. Is that the only one?

A. We didn't have too many plumbers and some accounts we haven't sold since. I am just trying to recall their names. Plumbing, as you know, is not a big item with us. I can't recall other plumbers that I might have sold Universal-Rundle fixtures to, might have sold others.

Q. Do you engage in any project sales, Mr. Tepper?

A. Not in the plumbing field.

Q. Do you sell to builders, however, heating equipment.

A. Heating equipment.

Q. Do you know what per cent of Hajoca's sales in 1957 would have been project sales?

A. No.

Mr. Depro: Objection, Mr. Examiner, as immaterial.

542 Hearing Examiner Buttle: I will allow it.

The Witness: I do not know.

By Mr. McAleer:

Q. You also testified on direct examination, Mr. Tepper, that you competed with a wholesaler by the name of Fisher Brothers, I believe.

A. Yes.

Q. Would you give me the name of one plumbing contractor in 1957 that purchased from you and also purchased from Fisher Brothers?

A. No.

Q. Do you know whether Fisher Brothers engaged in any project sales?

A. Yes.

Q. And do you know of your own personal knowledge whether or not Fisher Brothers engages in commercial sales?

A. I do not know.

Q. Mr. Tepper, in 1957 when you were selling to plumbing contractors, were those plumbing contractors engaged in reselling the fixtures for remodeling purposes or were they engaged primarily in selling fixtures for new construction purposes?

A. Remodeling.

Q. Remodeling?

Wouldn't it be unusual, Mr. Tepper, for a plumbing
543 contractor in remodeling a bathroom to take a lavatory that may have been purchased from Kohler, a bathtub that may have been purchased from Universal-Rundle, and a water closet that may have been purchased from American Standard and installed in a new remodeled bathroom?

A. No.

Q. Is the design of a Kohler tub identical to the design of an American Standard tub?

Mr. Depro: I object to it as immaterial.

Mr. McAleer: I don't think it is immaterial at all, Mr. Buttle.

Hearing Examiner Buttle: This relates to the same subject concerning which he is—he just interrogated the witness. I will permit it.

Mr. McAleer: May I remind counsel also, Mr. Buttle—I know I don't have to remind you, that Mr. Depro on redirect—on direct examination brought out the question of quality of the fixtures of American Standard and other competitors of Universal-Rundle, so I certainly think I am entitled on cross-examination to go into this question.

Hearing Examiner Buttle: Yes. Well, th has some bearing on it.

By Mr. McAleer:

Q. Would you answer the question?

A. No. I haven't answered the question.

544 Q. I say would you answer the question?

A. Yes. I do not know.

Q. You sell American Standard fixtures and you sell Kohler fixtures and you don't know whether the design of those two manufacturers is the same?

A. That is right.

Q. You do not know.

A. I do not know.

Q. Mr. Tepper, have you been interviewed by any representative of the Federal Trade Commission?

A. Yes.

Q. Excluding the last couple of days, when was the last time you were interviewed by the Federal Trade Commission representative?

A. About a year ago, I believe.

Q. Have you also been interviewed by a lawyer who represented Universal-Rundle Corporation?

A. Yes.

Q. Do you see that lawyer in the court room, Mr. Tepper?

A. Yes.

Q. Do you recall, Mr. Tepper, that at the time you were interviewed by the lawyer representing Universal-Rundle that you stated to him that you had no first-hand knowledge that you were paying any higher prices for Universal-Rundle fixtures than any other wholesaler in the Phila-
545 delphia-Camden area in 1957?

A. Yes.

Q. You have not changed that opinion, have you, Mr. Tepper?

A. No.

Q. When you resell plumbing fixtures, Mr. Tepper, to plumbing contractors, I believe you stated on direct that you sell most of your fixtures in three-piece sets.

A. Right.

Q. Do you charge one price for the three-piece set?

A. Clarify your question.

Q. Do you charge a single price for the water closet, a single price for the lavatory, and a single price for the bathtub?

A. If the mechanic wants a price on—gives me a list of material, I give him one price for the three-piece bathroom.

Mr. McAleer: I have no more questions.

Hearing Examiner Buttle: Did you say for the three-piece bathroom?

The Witness: Three-piece bathroom.

Hearing Examiner Buttle: Two-piece?

The Witness: Three.

Hearing Examiner Buttle: Three-piece.

Mr. McAleer: I have no more questions.

The Witness: In other words, the plumber doesn't care what the toilet costs individually. He wants to know
546 what that set of bathroom fixtures would cost.

Mr. Depro: I don't have any more. If you have a question, I won't object.

Hearing Examiner Buttle: Do you know whether or not accounts change hands frequently in your line of business in the Philadelphia-Camden area in which you operate?

The Witness: Accounts meaning who?

Hearing Examiner Buttle: Your accounts.

The Witness: Customers?

Hearing Examiner Buttle: Yes. Customers.

The Witness: Yes.

Hearing Examiner Buttle: They do change frequently.

The Witness: Yes, they do change frequently. Price being the big factor.

Mr. Depro: You say price was a big factor?

Hearing Examiner Buttle: Yes. That is what he said.

Mr. Depro: That is all I have, Mr. Examiner.

* * * * *

547 AARON RODGERS was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Hearing Examiner Buttle: Give your name and address to the Reporter, please.

The Witness: Aaron Rodgers, 24 Webster Avenue, Erlton, New Jersey.

* * * * *

549 *Direct Examination by Mr. Lipnick.*

Q. What is your residence address, Mr. Rodgers?

A. 24 Webster Avenue, Erlton, New Jersey.

Q. What is your business address?

A. The same.

Q. What is your business, sir?

A. Plumbing, heating and construction.

Q. And what do you do with respect to plumbing, heating and construction?

A. Well, in the plumbing and heating part we do new work, and in that I mean we make complete installation of the plumbing from the street all the way into the house, including the fixtures. As far as the heating we do the complete job also.

Q. Might your business be described as that of a plumbing and heating contractor?

A. Plumbing and heating and then the construction part of it, of course, we do heavier construction as far as sewers and water is concerned.

Q. In your business, sir, do you sell plumbing 550 fixtures?

A. Yes.

Q. And how long have you been in this business?

A. I would say twelve years.

Q. Are you yourself a licensed plumber?

A. Yes.

Q. In 1957 were you a licensed plumber?

A. Yes.

Q. And in 1957 did you sell plumbing fixtures?

A. Yes.

Q. To whom did you sell these fixtures?

A. To individual customers as well as builders.

Q. Would the individual customers be home owners?

A. Yes.

Q. And for what purpose did they buy fixtures from you?

A. To be installed in their bathrooms and kitchens.

Q. In 1957 did you sell Universal-Rundle fixtures?

A. Yes.

Q. From what source did you obtain the Universal-Rundle fixtures that you sold?

A. At that time we bought from Black and Brown in

Philadelphia, Collingswood Plumbing Supply in New Jersey, Hajoca Corporation—I would say that was the extent of it.

Q. Did you deal with Henry Supply House in Cam-
551 den, New Jersey?

A. No.

Q. Did you deal with Camden Plumbing Company?

A. Intermittently but only for small parts.

Q. Did you deal with Girard Supply in Philadelphia?

A. Yes.

Q. On what basis did you decide to buy a particular plumbing fixture from one rather than another of these sources?

A. Price usually. There was one other heavy supplier, Washington Plumbing Supply, and I believe they were in Conshohocken, Pennsylvania.

Q. Did you buy Universal fixtures from them?

A. Yes.

Q. And where are your customers located, sir?

A. Mostly in the Camden County area of New Jersey and partly the Washington Suppliers Supply for a development that I did earlier than '57.

Q. Don't tell us about earlier than '57.

A. All right.

Q. Unless we ask you.

A. All right, that wouldn't have nothing to do with it.

Q. Now, would you indicate for us what proportion of your plumbing business is done with individual home
552 owners or was done in 1957 with individual home owners? Can you give us an approximation with reasonable certainty as to that?

A. Do you mean as to the plumbing part of the business?

Q. Yes.

A. Well, indirectly—in my position it usually ends up directly with the home owner, the bigger share of it, be-

cause what a builder will do will be to buy a house using my fixtures—in the end I will wind up working with the home owner directly with the installation and moving it along. And my business is a little different than a development where the dealer never sees the home owner, and I would say probably eighty percent of it is with the home owner.

Q. In connection with this construction business, who hires you for the job? Does the builder hire you or the home owner?

A. Sometimes it is the builder and sometimes he turns me directly over to the home owner and I deal directly with him.

Q. In connection with the plumbing fixture aspect of your business—and I relate this particularly to the sale of plumbing fixtures as opposed to the installation of fixtures—would you tell us—

Mr. Fruchterman: Objection. He is leading the witness now.

553 Mr. Lipnick: Oh, Your Honor, I don't see how this is leading at all.

Mr. Fruchterman: He has never said a division of his business existed between installing and selling fixtures.

Mr. Lipnick: Very well, I will withdraw the question.

By Mr. Lipnick:

Q. Do you sometimes install plumbing fixtures that you do not sell?

A. Yes.

Q. Do you sometimes sell a plumbing fixture which you do not install?

A. I don't think so.

Q. Would your answer be the same for 1957, to the best of your recollection?

A. I don't think so.

Q. You don't think it would be the same?

A. I don't think I ever sold a fixture that I didn't install. I am not a supplier.

Q. In 1957 did you install fixtures that you had not sold?

A. That I had not sold—I believe so, yes.

Q. In connection with your plumbing business, sir, would you tell us who you consider to be your principal
554 competitors in 1957?

A. Well, that would be hard to point out, any specific competitors; because there are several of them and in that year I would say that there was no change. The biggest competitor as far as selling fixtures, do you mean?

Q. Yes.

A. As far as selling fixtures the biggest competitor would be the direct-to-you houses, and in saying that I am not picking any one particular place because there are several of them, like Henry Supply in Camden and places like that. I don't say Henry just to pin him down as the one but just to give you an example of what it is. Now, they are my biggest competitors in the selling of fixtures.

Q. Are they sometimes referred to as DTU's?

A. Yes.

Q. In what way will the DTU compete with you, sir?

A. They will sell directly to the customer off the floor or out of catalogue and deliver the fixtures to them and let them arrange to have them installed, or they will recommend someone to make the installation.

Q. In 1957 were there any other people other than the DTU houses which also sold the homeowners in competition with you?

555 A. Any people besides—

Q. Other—

Mr. Fruchterman: We object, Your Honor, there is a double question in there. Now, whether he means these other houses competed with him because they sold products,

or whether he just means that other houses other than DTU's sell the product directly we cannot tell.

Mr. Lipnick: I will withdraw the question.

By Mr. Lipnick:

Q. In 1957, sir, to your knowledge, other than the plumbing supply houses which were known at DTU's, were there any other people who sold plumbing fixtures directly to home owners?

A. I would like to ask a question but I don't know whether I am allowed to ask it or not.

Hearing Examiner Buttle: Do you understand this question?

The Witness: It has a double meaning to me.

Hearing Examiner Buttle: Well, you answer it in your own words.

The Witness: If you are referring to department store sales, too, I don't know how the Court looks at it, but to me the department store is a DTU outlet in some respects. That is the one way I can answer that.

Mr. Lipnick: Well, that answers what I had in mind.

556 By Mr. Lipnick:

Q. Would you name the principal department stores in your area which operated as DTU houses?

A. I would say that Sears sells direct to the customer and not through a plumber, which would make them a DTU in that one respect.

Q. Yes.

A. Also, again, I go back to Henry Supply. He is a DTU outlet although he is not a department store in the true sense but he does sell other things other than plumbing fixtures. There are two or three others on Cain Avenue and then there are some in Philadelphia that do the same thing.

Q. Mr. Rogers, insofar as your dealings with your customers and prospective customers are concerned with

respect to sales to them of plumbing fixtures, in 1957 did your customers indicate any general preference for a particular styling of bath tubs to you?

A. Most customers don't as far as the bath tub is concerned. In my general dealings with the public the bath tub, as long as it is a five foot tub if it has to be a recess or corner tub that is what it has to be. As far as the design, most of them are fairly close in design and the customer doesn't usually give you any preference for one over the other. Once in a while you hit one that does, but they
557 will tend to do this more on the toilet and wash basin. They are the things they are more interested in.

Q. What about kitchen sinks?

A. And kitchen sinks also.

Q. Does that go with tubs and toilets and wash basins?

A. No because it is in another room, in the kitchen. But the lady will have a preference whether she wants a single well, double well or stainless, or whatever she wants; she will have the preference for that.

* * * * *

558 Q. In 1957, sir, were you familiar with plumbing fixtures marketed by Universal-Rundle Corporation under the Universal-Rundle brand?

A. To some extent.

Q. To what extent did you sell them?

A. No, I stated before we have never—Oh, I am sorry, I misunderstood.

Q. Universal-Rundle?

A. Yes, we handled Universal-Rundle and I was familiar with it; oh, yes.

Q. Were you familiar with the fixtures marketed by American Standard?

A. Oh, yes, we handled American Standard also.

Q. Were you familiar with the fixtures marketed by Kohler?

A. Not too much.

Q. Were you familiar with the fixtures marketed by Crane?

A. There, again, not very often.

Q. Were you familiar with the fixtures marketed by Eljer?

A. Some, yes.

* * * * *

559 Q. In 1957 when you attempted to sell fixtures to your customers—Strike that. In 1957 the fixtures with which you just testified that you were familiar with, were there differences in design and styling between the fixtures offered by each of those companies?

A. Yes.

Q. Now, in 1957 did your customers request the styling of the American Standard fixtures as opposed to all others?

A. I couldn't say that all the customers did this; no. Some customers would have a preference for an American Standard fixture because of picking items of particular toilets out of advertising, as anyone may do.

Q. Would some persons have had a preference for Crane fixtures on the same basis?

A. Yes, sir.

Q. Would some customers have a preference for Kohler fixtures on the same basis?

A. Yes, sir.

Q. Would some customers have a preference for
560 Universal-Rundle fixtures on the same basis?

Hearing Examiner Buttle: What do you mean by that, that some customers indicated to you that they preferred certain manufacturers' items? I don't know that he is in a position to know what the preference was unless they asked him something about it.

Mr. Lipnick: That was the foundation I laid for that particular line of questions.

Hearing Examiner Buttle: Yes, but you asked whether or not customers had any preference. The only way the witness would know anything about it is whether or not they had indicated to him that they preferred to purchase an item of a particular manufacturer, or whether they were interested in an item to him, the item of a certain manufacturer. That overcomes the objection Mr. McAleer is going to make.

Mr. Fruchterman: We didn't object.

Hearing Examiner Buttle: You did before. I assume your objection was continuing in that respect.

By Mr. Lipnick:

Q. Mr. Rogers, what were some of the other factors in 1957 which your customers indicated to you induced them to purchase one fixture as opposed to another?

A. I—

Mr. Fruchterman: I object, Your Honor. It is 561 a leading question.

Mr. Lipnick: How in the world is that leading?

Hearing Examiner Buttle: Go ahead. The objection is overruled.

The Witness: The question again, please?

Hearing Examiner Buttle: Read the question.

Mr. Lipnick: I will rephrase the question.

By Mr. Lipnick:

Q. In 1957 did your customers indicate to you that there were factors other than the differences in design which induced them to purchase one bath tub as opposed to another, or one basin as opposed to another, or one toilet as opposed to another?

A. I would have to assume this, but the only factor that I could see would be price. Once I gave them a price on a certain fixture if it was too much money they would ask for a cheaper fixture.

Hearing Examiner Buttle: In other words, they didn't indicate the manufacturer's preference; is that what you are telling me?

The Witness: Only in this instance, if they wanted to differentiate between the two for another reason other than manufacturer the only other reason would be price.

Hearing Examiner Buttle: I see.

562 By Mr. Lipnick:

Q. Did customers in 1957 ask for less expensive fixtures than you were trying to sell them?

A. Oftentimes.

Q. Sir?

A. Oftentimes.

Q. Were you able to supply them with less expensive fixtures?

A. Oh, yes.

Q. Did some customers ask for less expensive fixtures and ultimately not purchase from you?

A. I couldn't honestly answer that in 1957.

Q. Mr. Rogers, have you ever installed a seat in a water closet on a toilet?

A. Yes, sir.

Q. How long does it take to do that operation?

A. About five minutes.

Q. What tools do you have to use?

A. An adjustable wrench or a pair of pliers.

Q. Have you ever—Does the term trim have any meaning to you, sir, with respect to plumbing fixtures?

A. Yes.

Q. What do you understand that term to mean?

A. We take the term of trim as meaning in the trade the brass, the shower curtain rods, the handles that trim out a bath tub or trim out a wash basin.

Q. And I heard you use the term brass, did I? Did
563 you use the term brass just then?

A. No.

* * * * *

By Mr. Lipnick:

Q. What does the term brass mean, sir?

A. Well, the term brass means the spigots, the construction part of the handles, the spout for the tub, particularly anything that is made of brass that goes along with making the operation of the fixture.

Q. When you bought Universal-Rundle bath tubs in 1957 was the brass attached?

A. No.

Pardon. If I can answer that a little further I can clarify it.

Q. Sure.

A. The brass on a Universal-Rundle or Standard or any other tub does not come out on the tub itself. It is roughed in the wall. The only part attached to the tub
564 is the drain and overflow.

Q. Do the drain and overflow come attached?

A. No.

Q. Were there any closets or spigots?

A. No. Do you mean attached?

Q. Yes, to the tub?

A. They are furnished but not attached.

Q. Now, what about water closets or toilets, was there any brass on those?

A. Yes, you have a ballcock assembly and a tank-ball and flushing arm, flushing handle and bolts and nuts.

Q. Did those come attached from the Universal-Rundle closets in 1957?

A. I believe they did except on a two-piece closet you had to mount the toilet—I am sorry. You had to mount the tank to the bowl.

Q. Is there any brass with respect to the lavatories or bathroom sinks?

A. Yes.

Q. And did that come attached from the Universal-Rundle lavatories you purchased in 1957? While you are thinking about that, sir, if you can't state with a reasonable certainty whether it did or not will you say so?

A. I can state that the drain assembly on the basin did not come attached but they did make a change and I
565 don't know what year it was in attaching the brass to the basin spigots an assembly.

Q. Have you ever installed brass on a basin?

A. Oh, yes.

Q. How long does it take to do that?

A. Including the drain, I would say twenty minutes to a half-hour.

Q. And what about kitchen sinks, have you ever installed brass on kitchen sinks?

A. Yes.

Q. How long does it take to do that?

A. Including the strainers, gaskets and drain assembly, I would say about an hour and a half.

* * * * *

571 Q. Have you either repaired or installed Universal-Rundle plumbing fixtures?

A. Yes.

* * * * *

609 By Mr. Lipnick:

Q. Mr. Rodgers, are you familiar with the building code of Camden, New Jersey, insofar as it relates to installation of plumbing fixtures?

A. Camden, New Jersey?

Q. Yes.

A. Not first-hand, no, sir, because I do not hold a license in the City of Camden.

Q. Where are you licensed?

A. I am licensed in Cherry Hill Township, Haddon Township, and about 15 other townships, but not Camden.

Q. Are those townships near Camden?

A. Yes, sir.

Q. And—

A. And we have what is known as the State of New Jersey code. We have adopted the State of New Jersey plumbing code in our townships.

Q. What does that code require insofar as installation of plumbing fixtures is concerned? Can anyone install a plumbing fixture?

A. No, sir, not anyone can.

610 Q. Who may install a plumbing fixture consistent with that code?

A. A registered licensed plumber, and I will have to go on with that to answer it. Also I believe under the code, or I know under the code of the State of New Jersey, you cannot stop a person from installing his own plumbing fixtures, but you can require him, if he builds his own home, you can require him to get permission to sell the property if he ever wants to or he can get the plumbing inspector to inspect the job and help him along with it. In other words, we try not to—it is hard to tell a man he can't build his own house and can't install his own plumbing fixtures, but as far as the trade is concerned, the open market, to work for a customer you have to be a licensed plumber.

Hearing Examiner Buttle: In other words, you can't get paid for it unless you are a licensed plumber.

The Witness: That is right.

By Mr. Lipnick:

Q. When you sell bathroom fixtures, sir, do you always sell them in three-piece sets?

A. Usually in a new installation we do, yes, for a three-piece bath.

Q. Do you do any business with respect to replacements?

A. Yes, sir.

Mr. McAleer: May I remind Commission counsel 611 that it would be best if he refers to the year 1957.

Mr. Lipnick: Very well. I will rephrase the question.

Hearing Examiner Buttle: All right. Go ahead.

By Mr. Lipnick:

Q. In 1957 did you do any replacement business?

A. A small amount, yes, sir.

Q. Was that replacement business done in three-piece sets?

A. I can't answer that for the year. We do do that but we do very little of complete replacement work. If a toilet is cracked, we may replace the toilet, but as far as remodeling, we do not do too much remodeling work.

Q. With respect to the sets that you sell, in 1957 did you sell three-piece sets in white?

A. Yes, sir.

Q. When you sold three-piece sets in white, was it possible for you to sell three pieces made by three different manufacturers?

A. I would say that it would be possible but not probable. I wouldn't do it, in other words, unless requested because the customer preferred maybe one certain make basin that nobody else made but she would prefer the toilet or commode of another manufacturer. But this would be very unusual.

Q. Would there be any reason why it would be undesirable in a three-piece set in white to mix the products of 612 different manufacturers?

A. I would say unless a manufacturer—and there is one that does this—went out of his way to get the exact mix of the enameling, of the other manufacturer, that it

would be pretty hard for him to bring a white out exactly like theirs unless he specifically wanted to do this.

Q. Is the difference in the white noticeable when you install a three-piece set in white?

A. To some people, yes. To people that want the look, I would say it would be noticeable.

Mr. Lipnick: Mr. Examiner, that will conclude my direct examination of this witness. I would like to request about a one-minute recess before cross-examination begins.

Hearing Examiner Buttle: All right.

(Short recess taken.)

Hearing Examiner Buttle: All right.

Mr. Fruchterman?

Cross-Examination by Mr. Fruchterman.

Q. Mr. Rodgers, I believe you stated you were a registerd plumber, is that right?

A. Yes, sir.

Q. And did you have to train to become a plumber?

A. Yes, sir.

613 Q. Did you apprentice?

A. I apprenticed, yes.

Q. How long is that apprenticeship before you become a journeyman?

A. In New Jersey in most places it is four years.

Q. And during that time you worked with journeymen and masters?

A. Yes, sir.

Q. And learned the trade, is that correct?

A. Yes, sir.

Q. Now, as a result of that training you were able to—

A. Take an examination and get a license.

Q. I see. And in order to get that license you had to be able to install plumbing fixtures and heating equip-

ment and sewers and almost every conceivable type of vessel that would carry water into a house, is that right?

A. All but the heating. We don't have to have that to—to get a plumbing license you don't have to know heating or have heating. You can get a plumbing license exclusively just for plumbing, but I did attend oil burner school and I did get the heating license also.

Q. Now, how long have you been practicing your profession of plumbing?

A. In business for myself?

Q. Yes.

614 A. I would say twelve years.

Q. And before that were you working with another plumber?

A. I worked with a plumber in a plant, yes, sir. Atlantic Refining Company in Philadelphia.

Q. I see. But in these past twelve years, now, you have been practicing your trade in the suburban area of New Jersey, is that correct?

A. Yes, sir.

Q. Erlton is quite close to Haddonfield, New Jersey, isn't it, sir?

A. Yes, it adjoins it.

Q. And you are licensed in Haddonfield?

A. No, sir.

Q. Did you say you were licensed in Haddonfield—or Haddon township?

A. Haddon township. Haddonfield is not part of Haddon township. Haddon township includes all of Westmont and part of Oakland. It is a pretty good sized area.

Q. I see. And only plumbers who are licensed in those areas are allowed to install fixtures in those areas for pay, is that right?

A. That is correct.

Q. Except for someone, a homeowner who wanted to put his own fixtures in his own home, he must go to a registered plumber.

615 A. This is done but it is discouraged by most plumbing inspectors, but it is done.

Q. It is in violation of the municipal code when it is done.

A. Well, that would be debatable. Under the code—it would depend upon the code because in—

Hearing Examiner Buttle: You know better than to ask a question like that, Mr. Fruchterman.

Mr. Fruchterman: I will agree it calls for a legal conclusion, yes, sir.

By Mr. Fruchterman:

Q. Now, during the year 1957 could you estimate the number of cast iron bathtubs which you purchased through Black & Brown?

Mr. Lipnick: Objection. If Your Honor please. I don't think the way that question is phrased, the response would have any probative value in this proceeding.

Hearing Examiner Buttle: All he has asked is do you know how many purchased from—what was it, Black & Brown?

Mr. Fruchterman: Yes, sir. He testified on direct that he purchased some from Black & Brown.

Mr. Lipnick: He asked him if he could estimate.

Hearing Examiner Buttle: What?

Mr. Lipnick: He asked him if he could estimate.

616 Hearing Examiner Buttle: Oh, well, can you estimate it with a reasonable degree of certainty?

The Witness: I can count the customers, yes, sir.

Hearing Examiner Buttle: All right.

The Witness: Because it was for a builder that we got these contacts through and we worked directly for

the customer once we received the contact. The builder was Wardco, Inc.

By Mr. Fruchterman:

Q. I see. Would you have bought a half dozen cast iron bathtubs from Black & Brown in 1957?

A. I would say it would have been more than that.

Q. More than a half dozen?

A. Yes, sir. I would say so.

Hearing Examiner Buttle: Did you say will you have bought?

Mr. Fruchterman: Did he buy.

The Witness: Yes, we did.

By Mr. Fruchterman:

Q. Would it be less than a dozen? Was it less than a dozen?

A. If you will just give me thirty seconds I can pretty well count them. I have a good memory for customers.

Q. All right, sir.

617 A. I would say between 10 and 11. Now, I could have forgotten a couple.

Q. Cast iron bathtubs manufactured by Universal-Rundle, is that right?

A. The majority of them were Universal-Rundle, yes.

Q. Now, you said that they were for a job that you were doing for the Wardco Company?

A. Wardco.

Q. Are they a builder?

A. Yes. They have custom homes that you can either put up yourself or they will put it up for you and all the ones we did, they put up the shell and some of them they did the whole job and we were turned over to the customer and we worked for the customer.

Q. So what you were doing was installing the plumbing.

A. And heating.

Q. In a new house, is that correct?

A. Yes, sir.

Q. Now, that is part of the new construction market, is it not?

A. Yes, sir.

Q. Now, besides—strike that, please.

During the year 1957 was your business primarily installing plumbing fixtures and other plumbing equipment?

In newly custom construction built houses?

618 A. If you mean by primarily that that was the largest part of my business, I would say the answer would be no.

Q. As far as the installation of plumbing fixtures is concerned, is the answer yes?

A. Yes.

Q. In other words, while you did other types of plumbing installations, sewer pipe—

A. Waterpipe, sir.

Q. —water mains and things of that nature, with regard to plumbing fixtures, when you were installing fixtures, the business that you were in was putting fixtures into new houses, is that right?

A. New houses, yes, sir, and we probably made some replacements of broken tile either here and there and odds and ends in the jobbing trade also. But primarily I would say that you were right, most of it was in new homes and new construction at that time.

Q. Do you advertise in the newspapers?

A. I have but I don't now.

Q. When people such as a builder come to you and ask you to do work for them, is it the fact that you sell a particular brand of fixtures or the fact that you sell your skill and your labor and your time that brings them to you?

A. I would say the latter.

Q. Would you state, then, that you are selling a
619 service rather than a product?

A. Mostly.

Q. Were you yourself working with the tools in 1957?

A. Some, but not too much.

Q. Did you have other plumbers working for you?

A. Yes.

Q. Would you be able to state what the hourly rate of a journeyman plumber working for you in 1957, what hourly rate he received for his labor?

A. A journeyman, non-union plumber, not only working for me but in most development work at that time, it was approximately $2.50 to $2.75 an hour.

Q. Would you be able to give a reasonable estimate of the amount of time in manhours that a plumber must expend in doing a bathroom installation? That is, the full three-piece set, the full job?

Mr. Lipnick: Objection. If Your Honor please, I think this question should be clarified in terms of what Mr. Fruchterman is referring to by a complete installation.

Hearing Examiner Buttle: Well, I think it is clear enough but it seems to me we are going a little far afield. Mr. Fruchterman is questioning with regard to the witness' qualifications apparently.

Mr. Fruchterman: No, Your Honor.

Hearing Examiner Buttle: Well, if you are not, you
620 are certainly way out in left field.

Mr. Fruchterman: May we approach the bench?

Hearing Examiner Buttle: Yes.

(Discussion off the record.)

Hearing Examiner Buttle: May we have the last question?

(The Reporter read the question as follows:

"Question: Would you be able to give a reasonable estimate of the amount of time in manhours that a plumb-

er must expend in doing a bathroom installation? That is, the full three-piece set, the full job?")

The Witness: One three-piece, not the whole house, not the kitchen or water heater or anything else. One three-piece bathroom set, is that the question?

By Mr. Fruchterman:

Q. So that it will operate and function.

A. You have to put water to it.

Q. Yes.

A. Then you have to run a sewer from the street in. So the question you are asking me, to make sure that I give you the proper answer, I have to know—you mean for a replacement or in a brand new home?

Q. Well, in a brand new home.

A. Well, then, in a new home we would have to 621 take part of the sewer, part of the water coming from the street into the house, and allocate a good percentage of the cost of this towards this bathroom set to come to a complete cost just for that three-piece set. Now, if you wanted to know for the whole house, say one bathroom, one kitchen, a two-bedroom home, then I can give you that, give that to you pretty well.

Q. Well, would you give me that estimate first.

A. For the whole house?

Q. For the whole house.

A. I believe at that time we were doing a three-piece bathroom with a kitchen sink and we didn't furnish the kitchen sink—the kitchen cabinet man did that—and the winter summer hookup so that was in—no water heater involved, and we were doing that for about $600 to $650 a house including the plumbing permit.

Q. Is that what you would consider a minimum price installation?

A. That would be below cost today and it was just about cost then.

Q. Now, you were also installing bathrooms in custom built houses in 1957, were you not? Larger houses?

A. Yes. Some of these homes in fact were two and a half bathrooms—they had different model homes. What we were doing for this same company.

622 Q. I see. But you are giving the price of one bathroom.

A. That is correct. I gave you a price for a bungalow, a two-bedroom house with us furnishing the bathroom and all the rough material.

Q. Well, now, on those products you purchased from Black & Brown, the majority of which were UR products were installed in custom built houses, were they not?

A. This is the home I am speaking of right now. You can have a two-bedroom custom built house as well as you can have a six, and the cost of these fixtures—our quotation, if I remember right, per house was $160 for a three-bedroom set, a three bathroom set.

Q. But the final—

A. Including the toilet set.

Q. But your final bill for such an installation would be up to $670, would it not?

A. It would be up around $600. We actually quoted these prices in advance. You have to take your rough material and add to that and the cost of your labor and add to that and the cost of your plumbing permit and add to that.

Mr. Lipnick: Mr. Examiner, I am going to request that—

Hearing Examiner Buttle: This is new matter, isn't it, involving the respondent's defense which, as a matter of fact, is why I indicated that that testimony was

623 apparently being allowed along the lines that I suggested, but you came to the bench and you explained to me the purpose of it which, as a matter of fact, is a

matter of respondent's defense. What you are trying to do is prove your case by interrogating the Commission's witnesses. So that is going to stop right here. You call your witnesses if you wish to adduce testimony along the lines that you suggested to me within the scope of the Minneapolis-Honeywell case.

All right. I see your point and there is no question about that, but I am not going to sit here and have you develop your case witness by witness.

By Mr. Fruchterman:

Q. At any time—

Hearing Examiner Buttle: Under the theory that this is part of cross-examination, I will allow it within limits but it is becoming too extensive, so cut it short.

By Mr. Fruchterman:

Q. At any time during 1957 when you submitted bids to new construction outfits such as this corporation which you have named, do you know whether Sears, Roebuck submitted bids on the work?

Mr. Lipnick: Objection. If Your Honor please, this question assumes a set of facts which is not in evidence in this case.

624 Hearing Examiner Buttle: Well, as a matter of fact, that is true. Objection sustained.

Mr. Fruchterman: May I point out, Your Honor, that there was testimony concerning Sears, Roebuck put on here. He asked him whether Sears, Roebuck was located in Camden. He found out how far he was from Camden. He asked him if he was selling plumbing fixtures.

Hearing Examiner Buttle: Do you wish to ask him some questions to contradict that?

Mr. Fruchterman: Yes.

Hearing Examiner Buttle: Then ask him.

By Mr. Fruchterman:

Q. Did at any time during 1957 Sears, Roebuck and yourself bid on the same project?

Mr. Lipnick: Objection.

Hearing Examiner Buttle: Well, there was no—there is no evidence with regard to that.

Mr. Fruchterman: Your Honor, if I do not go into this point—

Hearing Examiner Buttle: Objection sustained. It is new matter. You may offer it in your case. I told you today was going to be another day and this is as to new matter. Within limits I will go along with you, but—

Mr. Fruchterman: Your Honor, does your ruling apply to any question I ask with regard to competition between this witness during the year 1957 and Sears, Roebuck 625 during the year 1957?

Hearing Examiner Buttle: Well, as a matter of fact, competition between this witness and Sears, Roebuck?

Mr. Fruchterman: Yes.

Hearing Examiner Buttle: Well, insofar as competition between this witness and Sears, Roebuck is concerned, there has been no evidence whatsoever as I understand it to particularly establish competition between this witness and Sears, Roebuck.

Mr. Lipnick: If Your Honor please, this witness did state on direct examination that he considered certain DTU's to be his competitors as well as other plumbing contractors, and among the DTU's he included certain department stores. I believe he mentioned Sears, Roebuck as being considered a DTU.

My objection was that there was no testimony on direct examination with respect to bidding on building projects and that is what the question was asking about and that is entirely outside the scope.

Hearing Examiner Buttle: Of course, Mr. Fruchterman

is asking me a broad question as to whether or not I will allow any evidence on competition. You just ask the question, Mr. Fruchterman, and we will rule on the question without any broad ruling on my part as to what I am going to allow. I am going to allow you to interro-
626 gate with regard to any matter that has been asked on direct examination. I am going to allow you to interrogate with regard to new matter provided your interrogation along those lines does not become too extensive. I think I permitted too much of it yesterday that really did not involve cross-examination, not that I intend to preclude you from offering such evidence but I am not going to spend the day listening to you develop your case as to new matter through the witnesses of the Commission with regard to things that in no way affect the probative weight or the credibility of the witness or which in no way affect or have to do with an explanation of the testimony that this witness has already given. You may assume that that is my ruling. But you will not be precluded from offering such evidence on your case.

Now, as to the question of competition, you may interrogate this witness in some respects with regard to competition to the extent that it was dealt with in direct examination.

All right, go ahead.

By Mr. Fruchterman:

Q. Did you regard Sears, Roebuck and Company as a significant competitor of yours during the year 1957?

A. Yes,—well, there again that is a three-fold question because I not only sell fixtures. I also—a big part of
627 my business is selling services, as you pointed out before, and I agree, so when you say that, as far as the installation of fixtures is concerned, no, they are not a competitor. No.

Hearing Examiner Buttle: Insofar as what? Installation?

The Witness: Installation of fixtures. Anything relating to installing them is concerned, they are not a competitor.

By Mr. Fruchterman:

Q. And as far as your business which is connected with new contracts or new construction, they are not a competitor either, are they?

A. I would say that they are not in respect to the fact that as long as a builder can buy plumbing fixtures from the trade more reasonable than what he could from them, I am assuming this, that he would definitely do so.

Q. Isn't it a fact that the builders during 1957 did acquire their fixtures from the trade rather than Sears, Roebuck?

A. As far as my own general business is concerned, yes. I never supplied them any and they never supplied any other fixtures than what we supplied for them. And we in 1957, as far as I can remember, never had anything to do with installing any of the Sears, Roebuck equipment.

628 Q. So that any new construction work in which you were engaged, there were no Homart fixtures, is that right?

A. That is correct. In 1957.

629 Q. Do you have an opinion, sir, as to whether or not American Standard enjoys a greater amount of customer preference for its plumbing fixtures than any other manufacturer in the United States?

Mr. Lipnick: Objection. If Your Honor please, I think we are getting into new matter now.

Mr. Fruchterman: Your Honor, I respectfully direct

your attention to the fact that Mr. Lipnick asked some questions concerning customer preference on direct examination.

Hearing Examiner Buttle: Yes. I think that is true. But not phrased in that way.

Read the question.

(The reporter read the question as requested.)

Hearing Examiner Buttle: Objection sustained, but you may interrogate along those lines.

Mr. Lipnick: I might say this, if Your Honor please, if it will shorten this proceeding at all or serve Mr. Fruchterman's purpose. I am willing to concede that
630 American-Standard has greater sales of plumbing fixtures than any other domestic manufacturer.

Mr. Fruchterman: That isn't the point I am trying to make, Your Honor.

Mr. Lipnick: Well, then, you had better proceed.

Hearing Examiner Buttle: All right. Go ahead.

By Mr. Fruchterman:

Q. Have you noticed any customer preference with regard to design of plumbing fixtures based on your experience as a plumbing contractor?

Hearing Examiner Buttle: Does any customer preference come to your personal attention?

The Witness: Sometimes.

Hearing Examiner Buttle: When?

The Witness: Well, I just had one recently that came to my attention that still is at my attention because we are having a problem getting it.

Hearing Examiner Buttle: Did they come to your attention in 1957?

The Witness: Yes, sir. When you work with the general public—

Hearing Examiner Buttle: Go ahead, Mr. Fruchterman.

By Mr. Fruchterman:

Q. Will you state whether that preference exists
631 for any particular type of design?

A. More than any other?

Q. Yes.

A. I couldn't say that, no, because—

Q. Would that preference exist for the design manufactured by any particular manufacturer?

A. I would say that up until recently in this area that some of the dealers that American Standard used did a considerable amount of advertising, and I would stand to be corrected, but that they did a considerable amount more advertising for the American Standard product than did some of the other companies, and I think that through this they, of course—the people were more aware of their different fixtures and products than the others, and I believe it is from that reason.

Q. Then your testimony is that there is a customer preference and there was a customer preference in 1957 for the designs on the products of the American Standard Company.

A. I would say from the results of that advertising, that it would be up until recently now—

Q. That such a preference existed?

A. Yes.

* * * * * *

642 Hearing Examiner Buttle: With respect to competition, Mr. Fruchterman, I will permit you to interrogate this witness to the extent that the questions reflect that this witness and Sears, Roebuck are in the same mar-
643 ket. In other words, he has given some testimony to the effect that he has installed Sears, Roebuck tubs, isn't that right?

The Witness: That I haven't?

Hearing Examiner Buttle: That you have.

The Witness: Yes. Prior to 1957.

Hearing Examiner Buttle: Oh, prior to 1957.

The Witness: Yes, sir.

Hearing Examiner Buttle: But not during 1957.

The Witness: As far as I know, not during 1957.

Hearing Examiner Buttle: Well, that was my mistake. Then my recollection—have any of your customers in seeking you out indicated that they have looked at Sears, Roebuck tubs before they came to you and purchased one?

The Witness: Tubs?

Hearing Examiner Buttle: Yes.

The Witness: No, sir.

Hearing Examiner Buttle: Well, any other type of equipment? Water closet or basin?

The Witness: Mostly water heaters, I would say.

Hearing Examiner Buttle: Mostly what?

The Witness: Water heaters.

Hearing Examiner Buttle: Water heaters.

The Witness: Yes. Mostly water heaters.

Hearing Examiner Buttle: Was that back in 1957?

The Witness: Every year we have customers that
644 do this, but it is not only—they shop the community, Philadelphia.

Hearing Examiner Buttle: They shop Sears and Roebuck?

The Witness: Everywhere, and then they call us, how much we get for it and how much it is installed, trying to figure out every dollar.

Hearing Examiner Buttle: Have any of them—has any one of them indicated to you that they have been to Sears, Roebuck before they came to you?

The Witness: Yes, sir, and usually when they do, I sell them.

Hearing Examiner Buttle: You sell them.

The Witness: Yes.

Hearing Examiner Buttle: And that was in 1957.

The Witness: I would say every year that I go through this. I sell quite a few water heaters.

Hearing Examiner Buttle: That was just water heaters?

The Witness: Yes, sir.

Hearing Examiner Buttle: Insofar as tubs and basins—

The Witness: The rest of it, no, sir. Very little of that. Prior to that, when I was working as a smaller plumber myself, by myself, maybe I ran into it a couple of times, 645, that is all.

Hearing Examiner Buttle: In 1957 did you sell any equipment of that kind, that is, tubs of your own?

The Witness: Oh, yes.

Hearing Examiner Buttle: You did.

The Witness: In 1957, as I stated, we sold just in Rundle alone probably around 10 or 11 that I remember of.

Hearing Examiner Buttle: That was tubs, wasn't it, sir?

The Witness: Yes, sir. And then, of course, in the same year we probably sold an equal amount of Standard or maybe more. We were doing quite a bit of new work at that time.

Hearing Examiner Buttle: How far is Sears, Roebuck from you?

The Witness: I am four miles from Camden and Sears is just outside of Camden, I would say three, three and a half miles.

Hearing Examiner Buttle: You can ask any questions you wish in that connection, of course, when you complete this line of testimony. I will permit it to that extent.

Cross-Examination (Continued) by Mr. Fruchterman.

Q. Following the line of questions of the Examiner, Sears, Roebuck was not in new work, though, at that
646 time, is that correct? In 1957, in what you call new construction? Sears was not in—

A. Well, I couldn't very well answer that question of what Sears was in, to tell you the truth.

Q. But you never ran into them in new construction in 1957?

A. No, sir. I never had any problem in that respect in 1957.

Q. Now, when your customers come to you, Mr. Rodgers, does the average customer know very much about plumbing fixtures?

A. No, they don't.

Q. Does the average customer know how a toilet works?

A. No, they don't.

Q. And isn't it necessary for you to point out what the various features of plumbing fixtures are to your customers?

A. Yes, sir.

Q. So, as a matter of fact, don't you look out for the quality of the merchandise your customer gets even if the customer doesn't understand what the quality features of it are?

A. Yes, sir, but at one time when I was in the business in the market, the low cost, what we would call a low cost plumbing market, competitive market, we tried to sell qual-
ity along with a low price. So therefore we had to
647 keep them down in the lower brackets. But this had nothing to do with not selling in quality. Don't misunderstand me.

For instance, the washdown toilet you would sell them instead of a reverse trap. So you would have them—you

would save them maybe $30 or $40 there depending upon the combination, and the same with the tub and the rest of it.

Q. Yes, but for example, when a customer comes in and sees two water closets—water closet outfits in a catalog or on the floor of a showroom, he usually doesn't know the difference between a washdown and a reverse trap, does he?

A. No. The average customer wouldn't know. He wouldn't know even what you mean.

Q. If they said, why does that have to cost more than the outfit along side, you would have to explain it to them, wouldn't you?

A. You would have to explain it.

Q. An isn't the same thing true on almost all plumbing fixtures, that you have to explain what the features are if you expect to pay more, say, between two lavs, for example, or two tubs or two water closets? Is that correct?

A. As far as the mechanical part of it, yes. But not the appearance. A lady usually knows. They look in magazines and home magazine and things like that so if they are building their own home now—I am not speaking of a developer building twenty homes and you buy what
648 you get in the house, you see it and buy it or go to the next one and you buy it or don't—but when you build a house for a person, and I am speaking of homes in the $18,000 to $30,000 bracket, these women know what they want.

Q. As far as—

A. As far as mechanically concerned, no. But they do know from appearance sake what they want.

Q. And then am I to understand that appearances do make a difference?

A. Appearance in this market, it does make a difference, yes.

Q. So that the same size lav, say, a 20 by 18 inch lav manufactured by one maker and a 20 by 18 lav manufactured by another maker might not be on a par quality-wise for a woman who knows what she wants as far as design goes, is that correct?

A. That is correct. If she liked the style of one and it was a poor quality, she wouldn't know the difference or care. She would buy it. She would buy it for the looks.

Q. So looks do matter.

A. They do matter, certainly.

Mr. Fruchterman: No further questions, Your Honor.

Hearing Examiner Buttle: All right. Any further questions? Any redirect?

649 Mr. Lipnick: Yes.

Redirect Examination by Mr. Lipnick.

Q. Mr. Rodgers, do looks matter to all customers who buy plumbing fixtures from you?

A. If they buy them from me direct, they do matter, but as I explained before, at one time when we did development work, a builder will build a home or he will build twenty homes and he will give them a choice of X number of fixtures and they only can choose from those because that is in his cost range.

Q. Is that development work that you were just referring to sometimes known as a project?

A. Yes.

Q. In 1957 did you do project work?

A. Similar work with Wardco. It was similar. They gave them a choice of so many fixtures.

Q. Did that represent, that business represent a substantial portion of your plumbing fixture business?

A. In that year, yes. Yes. As I said before, we did a good business of work for them.

Q. Do all of your customers prefer the same style?

A. No, they don't.

Q. Did they all prefer the same style in 1957?

A. Sometimes I would say he didn't give them too
650 much of a choice as far as style was concerned.

Q. I am—

A. But color—

Q. I am not referring to your Wardco job now. I am referring to your—

A. Individual customers.

Q. —to your individual customers in 1957.

A. They do.

Q. The ones to whom you testify looks made a difference. Did they all prefer the same style?

A. No, sir. I have never seen any of them—

Q. Did some prefer one style and some prefer another?

A. Yes. Some of them would like, for instance, the American Standard had a ledgeback model, a companion, I believe they called it at that time, that they all—quite a few liked. And then Rundle came out with a new basin, and when anything new comes out and they do a lot of advertising behind this particular item, it is only natural that these ladies will look at it and like it and buy it. So that is the preference.

Q. With respect to that portion of your business, sir, from which you sell plumbing fixtures, do you submit—do you get special quotations from your suppliers which are lower than your formal list prices in order that you may submit competitive bids to contractors?

651 A. I may—I myself at one time did what we call in the trade shop every job as a lot of plumbers do.

Q. Did you do it in 1957?

A. In 1957—

Mr. McAleer: I object, your Honor. There has been no

foundation laid here at all with this that Mr. Rodgers buys direct from plumbing manufacturers.

Mr. Lipnick: I didn't say plumbing manufacturers, sir. I said from his suppliers.

Hearing Examiner Buttle: From his suppliers?

Mr. Lipnick: Yes.

Hearing Examiner Buttle: All right. I will allow it.

The Witness: As I said before, usually in the last—in the latter years I have found that for what it is worth, shopping doesn't pay off. So I usually use—I have three suppliers that I pretty well stick to.

Q. When you do this new construction work, which you were referring to, does the builder usually refer you to the individual home owner or the individual home owner to you?

A. In 1957 we had given them a small color selection. I give this to the builder, one of Rundle and one Standard, and the customer chose their colors from these. He had a catalog of each and they chose the basins in the price range and the toilets in the price range and the tubs in the 652 price range. They weren't allowed to go out of this competitive price range.

Q. Is that the Wardco job that you are talking about?

A. Yes, sir.

Q. Did you sell any other plumbing fixtures in 1957 other than the Wardco fixtures?

A. A few, yes.

Q. Well, now, were those others on the same basis or were those sold to home owners?

A. To home owners.

Q. And were they new installations?

A. Well, we do a small amount and did a small amount of jobbing. We had a bathroom here, say, that a lady would want taken out. We don't specialize in this or work for any builder in doing this, but if we have a customer that we

have been serving and she wants a new bathroom, it is only natural that she asks us to do that part of the work. We tell her we don't handle tile or rough. She has to get a handyman. So therefore every now and then I would have to pull my records to give you statistics, but every now and then we are always in the process of doing one of these or a powder room or replacing a cracked toilet or something in that respect, so we are turning a small amount of these fixtures over constantly.

Q. In 1957 did you install any fixtures which had not 653 been purchased from you?

A. Well, that is hard for me to answer that question without looking at my books which aren't here.

Q. Well—

A. To the best of my knowledge, once in a while a customer will buy fixtures from a small place up in Camden or Philadelphia or they will have a friend that will get them for them and it could be any manufacturer's fixtures, so therefore naturally we will give them a price on the installation because they want a registered plumber to do it.

Q. In 1957, sir, if a Homart fixture would have been put into a new installation in your area, would someone other than your company have installed it?

A. Could have.

Q. In 1957, sir, did you regard Sears, Roebuck as a major competitor of yours insofar as your sale of plumbing fixtures was concerned?

A. No, sir.

Mr. McAleer: I didn't hear the answer.

The Witness: No, sir.

By Mr. Lipnick:

Q. Did you regard them as a competitor insofar as your sale of plumbing fixtures was concerned?

A. I will answer that this way: anyone that sells the

same thing that I do at any time that I am selling it is a competitor. The volume I don't know. I can't say.

654 Q. Now, I would like you to explain what you consider to be the same thing as what you sell.

A. The same thing would be the same products. If I am trying to sell you a bathroom suite and someone else sells them also, and you are at liberty to go there and buy them, naturally you are a competitor under any rules.

Q. Well, my question really was in referring to selling the same thing as you sell, did you have reference to the testimony which you had given previously insofar as whether some fixtures were of like grade and quality or did you have reference to simply the fact that one was selling fixtures and another was selling fixtures?

A. Not any reference to any previous questions; I only merely took the question that you asked me and that was did I consider them a like competitor, is the way I took it, and as I said, anyone that would sell anything—

Hearing Examiner Buttle: Consider them a what?

The Witness: A like competitor. Like myself or like anyone else. If they sold the same thing that I sold, whether they only sold one a year or not, they would still be some type of competitor.

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661 PROCEEDINGS.

Hearing Examiner Buttle: Let the record show that we have reconvened at 9:30 a.m. in the matter of Universal-Rundle Corporation, Docket No. 8070, on October 19, 1962, in Court Room 7, United States Court House, Philadelphia, Pennsylvania.

Will the witness please take the stand. The witness has been sworn, was sworn yesterday.

You may proceed with the interrogation.

EUGENE SCRANTON was thereupon called as a witness for the Commission and, having been previously duly sworn, testified as follows:

Direct Examination by Mr. Depro.

Q. Mr. Scranton, will you tell us what your occupation is, sir?

A. I am a plumber.

Q. And do you work for anyone or for yourself?

A. Self-employed.

Q. How long have you been in the plumbing business?

A. I would say ten, eleven years.

Q. Now, where is your place of business located?

A. 832 Sylvan Street, Camden, New Jersey.

Q. Are you a licensed plumber under any jurisdiction?

662 A. City of Camden.

Q. Are you licensed under Philadelphia?

A. No.

Q. Do you have a name that you trade under other than your own name?

A. Gene Scranton.

Q. Gene Scranton.

A. Yes.

Q. That is just a proprietorship?

A. That is all.

Q. I see. And do you maintain a store or warehouse?

A. No, I do not.

Q. Now, were you licensed—you have been licensed for ten or eleven years?

A. Yes.

Q. And in the course of your business do you sell plumbing fixtures?

A. Yes.

Q. Did you sell plumbing fixtures in 1957?

A. Yes.

Q. And what make or brand or brands of plumbing fixtures did you sell?

A. Well, in 1957 I sold Universal-Rundle.

Q. Universal-Rundle?

A. Yes.

663 Q. Did you sell any others?

A. No, that is all.

Q. Universal-Rundle exclusively.

A. That is right.

Q. Now, from whom did you purchase the plumbing fixtures in 1957?

A. Harry Aarensberg.

Q. And who is Harry Aarensberg?

A. He is a wholesaler in Camden.

Q. Is he in Camden at the present time?

A. Yes, he is.

Q. Now, to whom do you sell such plumbing fixtures, Mr.—to whom did you sell such plumbing fixtures in 1957?

A. To whom?

Q. Yes.

A. My regular customers.

Q. Who would they be? Homeowners?

A. Homeowners, yes.

Q. And how would you get those customers?

A. Well, mostly through advertising in our village paper.

Q. You advertised in the village paper?

A. Yes.

Q. What paper is that?

A. That is called the South Jersey Tribune.

Q. South Jersey Tribune?

664 A. Yes.

Q. And then did they call you? Is that the way you get them?

A. Then the people would call me, yes.

Q. In the course of your dealings with these homeowners, what factor would you say would be considered the most important to these homeowners in their talks with you or contacts with you concerning the sale of plumbing fixtures?

Mr. McAleer: I object, your Honor. It calls for a conclusion by the witness.

Hearing Examiner Buttle: Yes. Isn't that true? You can reframe the question.

By Mr. Depro:

Q. What was the—when you—

Hearing Examiner Buttle: Objection sustained.

By Mr. Depro:

Q. Mr. Scranton, when you sought to sell plumbing fixtures to the homeowners, did you discuss any—what did you discuss with them? Or what did they discuss with you concerning the—

Mr. McAleer: I object.

By Mr. Depro:

Q. Concerning the products?

Hearing Examiner Butle: Well, why an objection now?

665 Mr. McAleer: I think he can be a little more specific, your Honor.

Hearing Examiner Buttle: Well, no. As a matter of fact, I would fix the time but—

Mr. Depro: This is in—

Hearing Examiner Buttle: Did you have a discussion with them?

The Witness: Oh, yes.

Hearing Examiner Buttle: And when did you have it? 1957?

The Witness: 1957. We were dealing in 1957, yes.

By Mr. Depro:

Q. And could you tell us whether there was any factor that was of great importance to the customers, the homeowners, prospective customers, in their discussions with you concerning the purchase of plumbing fixtures?

A. Well, price, but I believe that would be on the basis of the complete job, not as just fixtures and labor separately. Just as a unit.

Q. Did you sell the plumbing fixtures usually in—I am speaking of bathroom fixtures now—in sets of three-pieces?

A. Yes.

Q. Did you always sell in three-piece sets in 1957?

A. Yes.

666 Q. Now, in the sale of plumbing fixtures and in the installation of those—well, strike that.

In the sale of plumbing fixtures in 1957, who would you say was your most important competitor?

Mr. Fruchterman: Objection. It presupposes that he has a most important competitor. It presupposes that he—

Mr. Depro: Mr. Examiner, I may be stepping one or two questions here, but I think that—

Hearing Examiner Buttle: Of course, when the objection is made and there is a basis for it, I have to sustain it.

Now, I would allow you to pursue the interrogation but I will sustain the objection.

By Mr. Depro:

Q. With whom do you compete in your business, Mr. Scranton?

A. With whom do I compete?

Q. Yes.

A. I think I compete with every plumber in the City of Camden.

Q. And do you compete in 1957—did you compete with any other than plumbers? Anyone other than plumbers in the sale of plumbing fixtures?

A. Oh, yes.

Q. With whom?

A. I have competed with Sears & Roebuck's.

667 Q. And who else?

A. That would be about the biggest one that I know of. I can't think of any others.

Q. Would you say that among all of those with whom you have competed in 1957, could you tell us which one was the most—was the largest of those competitors?

Mr. Fruchterman: Objection, your Honor. We will stipulate that Sears is larger than—

Hearing Examiner Buttle: What?

Mr. Fruchterman: We will stipulate that Sears is a large one and does he mean is the store bigger? Does he mean it has more stores?

Hearing Examiner Buttle: I know, but you say you will stipulate to it and then you say—

Mr. Fruchterman: I don't—

Hearing Examiner Buttle: I will sustain the objection.

By Mr. Depro:

Q. Well, Mr. Scranton, can you tell from your experience in the sale of plumbing fixtures in 1957 where the

greatest competition came from insofar as you are concerned?

A. The greatest competition would be from Sears, I would say.

Hearing Examiner Buttle: What is the basis of your conclusion in that respect? Why?

668 The Witness: Well, they are bigger. They are bigger, much larger. More people deal with them.

Hearing Examiner Buttle: It has nothing to do with any experience that you have had in selling your products as opposed to their products?

The Witness: No. No.

Mr. McAleer: I move, Mr. Buttle, that his testimony be stricken with respect to competition with Sears.

Hearing Examiner Buttle: I will allow it to stand.

* * * * * *

669 Hearing Examiner Buttle: Do you sell fixtures and bathroom equipment separate and apart from making the installations?

The Witness: No. No. I sell—it is a combination. In other words, sell and install.

Hearing Examiner Buttle: You never sell the equipment?

The Witness: Singly, no.

Hearing Examiner Buttle: Separately?

The Witness: No.

Hearing Examiner Buttle: In other words, it is only in connection with installation that you are making.

The Witness: That is right, your Honor.

* * * * * *

679 By Mr. McAleer:

Q. Mr. Scranton, is—you are a licensed plumber 680 in the City of Camden, New Jersey?

A. That is right.

Q. How long does it take you to become a licensed plumber?

A. You have to go to school for four years, vocational school. You have to serve—well, I served on-the-job training through the GI.

Q. How many years, sir?

A. Four years.

Q. You are not licensed as a plumber in the City of Philadelphia?

A. No.

(The Reporter read the question as follows:

681 "Question: Mr. Scranton, could you describe for us what type of training you must have during—what type of training you do go through during the four-year period of time before—.")

By Mr. McAleer:

Q. Before a license is issued to you as a plumber.

A. Well, you have to first of all—the way it was done with me, I went to work for this man when I was very young, about 14 years old, and after school, during the summer, and then after service I went into the GI Bill.

Now, this sent me to vocational school and they taught us theory and labor and at the same time I was working during the day. And then eventually after this was all done I went up and took my test and got my license.

Q. Did you during the course of your training, Mr. Scranton, have to install fixtures, plumbing fixtures?

A. Have to install? I wasn't a journeyman. I was more or less of an apprentice. I was a helper. Let me put it that way.

682 Q. As a helper did you assist a journeyman in installing fixtures?

A. Yes, sir. Assist.

Q. Did you install various manufacturer's fixtures when you were in training?

A. Yes. We installed different lines. I believe if I am not mistaken that he installed more Universal than anything.

Q. While you were in training, sir?

A. Not me. With the man that I was working for.

Q. Who were you working for?

A. Mr. John Emmel.

Q. Now, Mr. Scranton, you stated on direct examination that you purchased plumbing fixtures from Harry Arensberg in 1957.

A. That is correct.

Q. And as I understand your testimony on direct, you also stated that you only installed Universal-Rundle fixtures in 1957. Is that correct?

A. That is true.

Q. Mr. Scranton, if you only installed Universal-Rundle fixtures in 1957, how do you enable a customer to pick and choose among various brands or various manufacturers if you only carried the one brand in 1957?

A. Well, just the idea. I just carried that one brand, period, and that is what I showed them and that is 683 what they would accept.

Q. You had no customer in 1957 that ever asked for a brand other than Universal-Rundle?

A. Oh, I would say—not very many. If they did, it was —I can't remember exactly, maybe one or two. It would be American Standard or something like that.

Q. So you did install fixtures other than Universal-Rundle's in 1957?

A. Well, two or three. I would say yes.

Q. Where did you purchase the American Standard fixtures that you installed in 1957?

A. From Mr. Arensberg.

Q. Was the price of the American Standard fixtures higher than the price of Universal-Rundle fixtures in 1957?

A. I believe so.

Q. The consumer was shown both the Universal-Rundle fixtures and the American Standard fixtures in 1957?

A. They weren't shown the American Standard. They wanted the American Standard—

Q. They were willing, then, to pay a higher price for the American Standard fixtures than they were for the Universal-Rundle fixtures.

A. If that is what they wanted, that is what they paid.

Q. Based on your experience, Mr. Scranton, as a plumber for some twelve years, could you give us your opinion
684 as to why a consumer would pay a higher price for American Standard fixtures than they would for a Universal-Rundle fixture?

* * * * *

The Witness: Well, the only reason I could say is because they were just interested in that fixture. That is what they wanted and that is all there was to it.

687 By Mr. McAleer:

Q. Mr. Scranton, I believe you testified on direct examination that you sold only three-piece sets in 1957. Do you mean to say, Mr. Scranton, that you didn't sell one single bowl or one single tank during the year of 1957?

A. Oh, yes. But installation of bathrooms, three-piece sets.

Q. Could you give me your best estimate of the proportion of your sales of fixtures that were in three-piece sets as opposed to single pieces?

A. As opposed to single pieces. Well, I definitely sold more three-piece sets than I did single. I can't be sure on the proportion, the difference between the two.

Q. Then you don't know the proportions.

A. No. I am not positive.

Q. Mr. Scranton, when you install a three-piece set,
688 would you be installing that set on a bathroom that is being remodeled?

A. Yes.

Q. Now, when you install a three-piece set when you remodel a bathroom, do you price each of the individual fixtures or do you quote one price for the installation of the fixtures in the remodeling—the remodeled bathroom?

A. I would quote one price, one price for the remodeling. When I say remodeling, I am just talking about plumbing, period. In other words, the three fixtures and the plumbing. I am not talking about any tile work or anything like that.

Q. When you install a three-piece set, the consumer gets one price for the installation and the three-piece set?

A. That is right.

Q. And that would include your labor, would it?

A. Yes, included.

Q. Could you tell us, Mr. Scranton, what the average installed price for a three-piece set bathroom was in 1957?

A. Well, I believe—I can't be too sure of this but I believe that I was getting around $420.

Q. $420.

A. Yes. Somewhere around there. That is a white set.

Q. And what would a colored set be, Mr. Scranton?

A. Well, there is a difference of—well, in the fixtures there is a difference of about $20. $20, I imagine.

689 Q. What would the difference be in the installed price?

A. Installed price? 30, $40.

Q. Now, Mr. Scranton, when a three-piece set installed costs approximately $420 in 1957, of that total price what would the consumer be charged for the three-fixtures that were placed in the bathroom?

A. The three fixtures?

Q. Yes.

A. I would say $130 to $135.

Q. The rest—what other materials would be needed to install a three-piece set?

A. Drainage.

Mr. Depro: Mr. Examiner, I am going to object to that. I don't see the relevancy of this, what this man's prices are, to the charges of discriminating in price on the part of Rundle. Rundle didn't even sell to this man. But he is in here not for that purpose at all. And I am going to—I never went into that at all on the direct examination. It seems to me that it is going—it is of no value and he has no records here. He does his guessing at the thing. What good is it?

Mr. McAleer: Mr. Examiner, if you would, please, I think that the witness did quite a bit of guessing on direct examination and I believe that the witness on direct examination testified that he sells in three-piece sets and 690 he sells on an installed basis. As I understand the purpose of Mr. Depro in calling Mr. Scranton as a witness, he is attempting to show that Mr. Scranton as an installer of plumbing fixtures was injured because he as an installer paid a higher price than some other purchasers of fixtures from Universal-Rundle. So as an installer of fixtures, Mr. Examiner, I think we are entitled to find out just exactly how the man prices his fixtures, what it costs a consumer to get those fixtures in his bathroom.

Hearing Examiner Buttle: Are you claiming that, Mr. Depro, that this man was injured?

Mr. Depro: I can certainly claim that, Mr. Examiner, and I do, that he was in direct competition with Rundle's products, that went through Sears, the Homart line, but what possible advantage is it to this lawsuit to determine how much the witness charged for installing three pieces?

Hearing Examiner Buttle: That isn't what Mr. McAleer is after in the ultimate.

Mr. Depro: Well, he was asking—

Hearing Examiner Buttle: I will allow it.

691 The Witness: Lead pipe, drainage. Proper pipe for waterlines. That would be about it.

By Mr. McAleer:

Q. Now, how much would the materials that you have just mentioned cost the consumer when you were installing three-piece sets?

A. How much would be the materials? That is all according to the size of the room that you would be working in.

Q. Let me ask you this, Mr. Scranton, what was your labor charge in 1957 for installing a three-piece bathroom set?

A. You have around $220.

Q. $220 for your labor?

A. Yes.

Q. How much do you charge for the trim that will be put on the fixtures?

A. The trim comes with the set.

Q. You buy the trim already on the fixtures?

A. The trim comes with the outfit.

Q. You don't—do you buy the trim from Mr. Arensberg?

A. That is right. It comes—in other words, he gives me a price for the three pieces and that includes all the trim.

Hearing Examiner Buttle: In other words, the $220 includes everything.

Mr. McAleer: The $220, your Honor, is labor.

692 The Witness: That is labor. $135 would include your three pieces plus the trim.

Hearing Examiner Buttle: The $220 is the labor for

the trim and putting in the trim and everything else, isn't it?

The Witness: Yes. That is labor for everything.

Hearing Examiner Buttle: We are speaking of material now.

Mr. McAleer: Mr. Buttle, if I could just clear up this, when we are talking in terms of fittings, I am talking about the pipe, the sewer pipe.

Hearing Examiner Buttle: The material.

The Witness: You are talking about fittings. You are mentioning the sewer pipes.

By Mr. McAleer:

Q. Yes.

A. No. When I say fittings I am talking about the fittings that come on the fixture, faucets, supply pipes, traps for the floor.

Q. These are all on the fixtures, when you buy them?

A. They are not on the fixtures.

Mr. Lipnick; Mr. Examiner, I object.

Hearing Examiner Buttle: There is an objection.

Mr. Lipnick: I am going to have to object to this line of questioning for this reason, sir. There was testimony 693 on direct examination that insofar as selling plumbing fixtures is concerned, this witness compete with Sears. However, that was all. This line of questioning is going farther and farther way, way beyond the direct, unrelated to the scope of the direct examination. What is happening here, sir, is what the respondents indicated yesterday in which they are trying to bring this case within the scope of the holding in the Minneapolis-Honeywell case and that, sir, is part of their defense, and I don't see any reason why we have to sit through this case in chief and spend five times as much watching the respondents develop their case as we do to put the Commission's case in.

This testimony doesn't explain, contradict or qualify anything this witness said on direct examination, and that is all they are entitled to do.

Hearing Examiner Buttle: Well, I thought what Mr. McAleer was trying to do was separate the material costs from the labor costs so that we would know what the material cost was, and he was going to develop something from that. Assuming that is the case, if the interrogation is along those lines, I will permit it. If it is not, you can make another objection and we will do something about it.

Mr. Lipnick: Even if he does separate it, I don't see how that relates back to what this witness said.

694 Hearing Examiner Buttle: I am not going to discuss that now. I see, as a matter of fact, that there might be some point to that. Maybe I am wrong about it.

Proceed, Mr. McAleer. Let us not get involved in this labor again.

* * * * *

By Mr. McAleer:

Q. Mr. Scranton, you spent some twelve years as a plumber?

A. Yes, sir.

Q. You consider yourself a highly trained technician, do you not, Mr. Scranton?

A. I consider myself a plumber.

Q. You consider yourself a good plumber, sir?

A. Yes.

Q. Mr. Scranton, when a consumer comes to you to talk about the installation of plumbing fixtures, are they coming to you because of your training as a plumber?

A. Yes.

Q. They are thoroughly familiar, then, with your reputation as a plumber in the community of Camden.

695 A. I would say so.

* * * * *

702 How often did you advertise in the year 1957, Mr. Scranton, in the South Jersey Tribune, I think you stated?

A. Every week.

Q. Every week. And you advertise—when you advertise, Mr. Scranton, do you include any prices in your advertising?

A. No.

Q. You advertise yourself as a plumber, is that right?

A. Just advertise as a plumber.

Mr. McAleer: I have no more questions.

Hearing Examiner Buttle: Redirect.

Redirect Examination by Mr. Depro.

Q. Mr. Scranton, you were asked on cross-examination about the comparative price of American Standard set, bathroom set, and a Universal-Rundle, and you said that the American Standard was a higher price.

A. Yes.

Q. Did you in determining the price or comparing the prices, in giving that answer, include the brass?

A. Oh, yes. Yes.

Q. Well, is there any difference in the cost of the 703 brass to you of the American Standard as against Universal-Rundle?

A. Brass—you are talking about brass.

Mr. Fruchterman: Objection.

By Mr. Depro:

Q. Yes.

Hearing Examiner Buttle: Objection overruled.

The Witness: Universal-Rundle, you don't buy brass from Universal-Rundle. I mean, it comes with the fixture. And American Standard does sell brass. You can buy American Standard brass. I think—

By Mr. Depro:

Q. Well, is there any way—can you determine the comparative cost to you of the two companies brass? Which is the higher? Or are they the same?

A. I can't say too much about Universal. I mean, as far as their brass is concerned. But I know that American Standard is high.

Q. Well, do you know in determining, in giving the answer on cross-examination on this point where you said the American Standard set was higher than the Universal-Rundle, do you know what the prices of the tub, of the plumbing fixtures without any fittings, without any brass, were?

Mr. McAleer: I don't think he has testified the tub has any brass on it, Mr. Examiner.

704 Hearing Examiner Buttle: I don't recall that.

Mr. Depro: I am asking him that, Mr. Examiner. In his determination of that price, did he include a price that was a competed price, including the brass.

The Witness: Yes. It would be complete.

Mr. Depro: And he said it was. Now, I wanted to strip it off the brass price, if I can, and have him make a comparison of the—just the tub and the basin and the toilet without any—

The Witness: I can't.

Mr. Depro: —fittings.

The Witness: I cannot do that. That I can't do.

By Mr. Depro:

Q. You cannot?

A. No.

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705 By Mr. Depro:

Q. Mr. Scranton, do you require that the customer or prospective customer buy fixtures from you before you will install bathroom fixtures, for example?

A. Buy from me?

Q. Yes.

706 A. No. They don't have to buy from me.

Q. You will install, will you?

A. I will install, yes.

Q. If they get the fixtures from someone else.

A. Yes.

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727 WALLACE L. DUNN was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Hearing Examiner Buttle: Give your name and address to the Reporter, please.

The Witness: Wallace L. Dunn.

Hearing Examiner Buttle: Residence address.

The Witness: 733 Mt. Vernon Avenue, Haddonfield, New Jersey.

Direct Examination by Mr. Depro.

Q. Mr. Dunn, what is your business?

A. I am a division manager for Sears, Roebuck & Company in the plumbing and heating department.

Q. And where is your place of business located?

A. 1300 Admiral Wilson Boulevard, Camden, New Jersey.

Q. How many stores—do you have more than one store that is in that division? You say division manager. What do you mean by that?

728 A. Well, the store is broken into divisions such as the plumbing-heating division, building materials division. It is a department, really.

Q. I see.

A. A department of the store.

Q. The word "division" is another word for department?

A. Right. Sears terms them divisions.

Q. I see. And how long have you been division manager of plumbing and heating in the 1300 Admiral Wilson Boulevard store?

A. Approximately eleven years.

Q. Eleven years?

A. Approximately.

Q. What would you say your duties are in that capacity?

A. Primarily overseeing the outside salesmen, reordering from our local pool stock such goods as we need to stock our shelves, and general detail work in connection therewith.

Q. What do you mean by outside salesmen?

A. Salesmen who would go out into the—on a street, into the customer's house to measure for installation the goods we sell.

Q. How many salesmen do you have?

A. Currently?

Q. Yes.

729 A. Eight men.

Q. How many did you have in 1957?

A. As I recall, seven.

* * * * *

737 Q. Is it customary, Mr. Dunn, for you to confer with the merchandise manager from time to time with respect to advertisements similar as the one shown in No. 91, Commission Exhibit No. 91?

A. Yes, sir. It is customarily required.

Q. Now, did you have much discussion with the merchandise manager for the same purpose in 1957?

A. Yes.

Q. And as a result of those discussions, were the bath-

room fixtures that you sold under the Homart brand at that time, in 1957, advertised in the local newspapers?

A. Yes, they were.

Q. And what was the purpose—and the purpose of the advertising was to—was what?

A. Two-fold. Primarily to secure what we term leads, customers' names so we could go into their homes to sell and merchandise, in addition to this, completely renovated bathrooms, and secondly, to sell the bathroom over the counter, if need be.

738 Q. And how do you secure the leads?

A. The customer would come in. The salesman in talking with them would explain our installation services and our tile services and arrange an appointment to meet them in their home to measure, and so forth, for the job.

Q. Did some of the customers mention the ads as having been seen by them in the papers?

A. I would say yes, customers mentioned the ad.

Hearing Examiner Buttle: Does Sears have installation services, too?

The Witness: Yes, sir.

Hearing Examiner Buttle: They install their own equipment?

The Witness: Sears does not. We install it through subcontractors.

Hearing Examiner Buttle: The customer can select anyone he wants to install it, can't he?

The Witness: Oh, yes, sir.

Hearing Examiner Buttle: You only do this in the event they have no one to do it, is that it?

The Witness: Well, we try to sell them installation and tile but sometimes customers prefer to have their own men do the work.

Hearing Examiner Buttle: Does Sears, Roebuck participate in the problems of installation?

739 The Witness: Such as they are, yes, sir.

By Mr. Depro:

Q. Mr. Dunn, did Sears, and I am referring to your department, the division that you are the manager of, plumbing and heating, in 1957 advertise that they would arrange for installation of plumbing fixtures?

A. Yes, sir.

• • • • • •

740 Q. Well, Mr. Dunn, did Sears in 1957 include the installation charges together with the price of the fixtures as one contract?

A. In the ad?

Q. Yes.

A. No. The advertisement here does not include the price of installation of fixtures.

741 Q. I don't mean the price itself but I mean would they offer to do that in one contract?

A. Oh, yes.

Hearing Examiner Buttle: Is one price quoted for the equipment and installation or were separate prices quoted in the advertisement?

The Witness: In the advertising, the prices quoted I would say in 1957, with rare exceptions, would be for the material only.

Hearing Examiner Buttle: The material only?

The Witness: Yes, sir. The labor price generally was not included.

• • • • • •

748 Q. Did you ever make any sales to building projects, apartment houses or the like?

A. You are talking—

Mr. McAleer: I don't know what he means by "the like". I object.

Mr. Depro: Well—

By Mr. Depro:

Q. Any sales where you would sell in multiples, more than five or six?

A. Oh, I would say no.

Q. Did you sell to anyone who walked into the department and wanted to buy?

A. Yes, sir.

Q. Now, as a result of the advertising or otherwise, did any of your prospective customers inquire about installation?

A. Yes, sir.

Q. And what would you or your salesmen tell that 749 customer in that respect?

A. Well, we would explain our installation service.

Q. What was that?

A. That we would come to their home, measure up the room, see what fixtures were needed or what could be put in there, explain the fact that we could install tile, do carpentry work, general rennovation work, and we would go to their home and give them a lump sum price for all the work that they wanted done and that we were capable of doing.

Q. Well, now, did you have plumbers who would go to their homes?

A. On request the plumbers would go out to the homes with the salesmen or on their own.

Q. Did you have plumbers who worked for Sears or were they independent contractors?

A. Independent contractors working under contract to Sears.

Hearing Examiner Buttle: I think the terminology he used before was that they were subcontractors.

The Witness: Yes, sir. Well, I was in error. Actually they work under a contract through our installation department.

Hearing Examiner Buttle: Well, do they have—are they under contract job by job or are they under
750 contract to do the jobs that you call upon them to do?

The Witness: They are under contract to do the jobs that we call upon them to do by assigning them those jobs.

Hearing Examiner Buttle: Yes. Well, before they are assigned the jobs, do they agree to the subject of being under call to some contract arrangement that you have with them or do you just go out and seek the contractor every time you get a new job?

The Witness: No, sir. We sign up a contractor who works under contract to Sears. When we sell a job we will send him a work order to go and do that piece of work.

Hearing Examiner Buttle: In other words, he is under contract with you to do the work for you at a contract price to be fixed as each job is done, or how does it work?

The Witness: I may be misleading you a little there.

Hearing Examiner Buttle: Just tell me how it is done.

The Witness: Actually briefly, if it is possible, we sign a contract with the customer. We agree to sell him the goods.

Hearing Examiner Buttle: Yes.

The Witness: We agree to arrange as the customer's
751 agent for installation. The contractor, in the case of plumbing, the plumber, works under a contract signed with our installation department and the installation department assigns him to this specific job.

Hearing Examiner Buttle: The subcontract is between yourself and the plumber?

The Witness: Actually we consider that we are acting as the purchaser or the customer's agent and we are working as an agent between the customer and the plumbing contractor.

Hearing Examiner Buttle: Do you have contractors working for you on a permanent basis, that is, as work is assigned to them, you assign it?

The Witness: Yes, sir.

Hearing Examiner Buttle: To them as a group? There is a group of contractors?

The Witness: Yes, sir. They work for the installation department on a permanent basis.

Hearing Examiner Buttle: They work for the installation department of Sears, Roebuck on a permanent basis.

The Witness: Yes, sir.

Hearing Examiner Buttle: And do they receive any compensation for that aside from the installation charges of each particular job?

The Witness: Not to my knowledge.

752 Hearing Examiner Buttle: In other words, all the compensation they can expect is the compensation you agreed upon with the customer, is that right?

The Witness: That is right, sir. Generally it is a predetermined amount, a fixed figure which we sell, and the contractor is paid on the basis of a fixed scale.

Hearing Examiner Buttle: Do they agree to work at your installation charge or do they fix the installation charge?

The Witness: They just generally agree to work at an installation charge that is agreed upon between Sears and the contractor. In other words, a negotiated sum.

Hearing Examiner Buttle: All right.

By Mr. Depro:

Q. And the customer in that situation pays Sears and Sears pays the contractor.

A. We pay the contractor on notice from the customer that he is satisfied with the man's work.

Q. I see. Is this customary or is that the way it is

done in each instance? I mean, are there any other arrangements between customers for installation?

A. You mean as far as Sears is concerned?

Q. Other than what you just said, yes, sir.

A. Not to my knowledge. All our contracts are in the standard form and signed in the same manner and
753 processed in the same manner and would normally follow the same procedure, I would say, to the best of my knowledge. I am not—

Q. Is that the way it was in 1957?

A. The same today as it was then.

Q. Can you tell—let me ask you, did you make any sales in 1957 of plumbing fixtures in which Sears did not make arrangements for installation?

A. Yes, sir.

Q. Can you tell us what proportion of the sales were so arranged without installation?

Mr. McAleer: Objection, your Honor.

Hearing Examiner Buttle: I don't know what—what difference would it make as to what proportion it was?

Mr. Depro: I wanted to see just what—

Hearing Examiner Buttle: Are you going to have me worrying about that when I write my decision?

Mr. Depro: As to—

Hearing Examiner Buttle: What difference does it make?

Mr. Depro: Well, I would like to know which was the —which category was the largest, the greatest majority of sales, were the greatest majority of sales, where they were made, whether they were on the installation basis in which Sears arranged for the installation or otherwise.

754 By Mr. Depro:

Q. If you can answer that, I would like to have it.

Hearing Examiner Buttle: I don't suppose it makes any difference, but go ahead.

By Mr. Depro:

Q. Do you substantially do business in both ways, namely—

A. We do business both ways, yes, sir.

Q. Can you tell which of the two ways is the greater business, greater volume?

A. I can't say with any degree of certainty without checking records, but on a reasonable degree, I would say the majority of the sales are without installation.

Q. Majority without installation.

A. Without installation, yes, sir. Not installed.

Q. Would that be the same in 1957 or can you tell?

A. I would say substantially the same.

* * * * *

762 *Cross-Examination by Mr. Fruchterman.*

* * * * *

Q. The date—strike that, please.

These independent contractors or subcontractors that
763 you referred to on direct examination, are they free to sell any brands of plumbing fixtures they desire to sell?

A. May I clear up one point? If I said subcontractors, I was in error. They are contractors working under agreement with Sears. I would like to make that straight so far as I am concerned personally.

But to answer your question specifically, to the best of my knowledge, they can sell anything they wish to anybody they wish.

Q. Of course, not when they are working under an arrangement with Sears, but in their regular business.

A. In their regular business it is my understanding that they can sell anything they want to anybody they may choose.

* * * * *

792 JAMES P. VERNILE was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

* * * * *

793 *Direct Examination by Mr. Lipnick.*

Q. Mr. Vernile, what is your business address?

A. 6339 Market Street, Philadelphia, Pennsylvania.

Q. And what business is located at that address?

A. It is a retail Sears & Roebuck retail store, is located at that address.

Q. Are you employed by Sears & Roebuck?

A. Yes, I am.

Q. And you work at that address?

A. Yes, sir.

Q. Do you have a title?

A. Yes. I am the Division Manager of the plumbing and heating department.

Q. What are your duties as Division Manager of the plumbing and heating department?

A. Well, there are two—direct sales, getting of sales, and I have eight salesmen under me that sell on the
794 inside and outside. These salesmen will meet customers who come into the store.

Q. Would it be correct to state that your primary responsibility is to direct the sales activities of the plumbing and heating department?

A. Yes.

Q. And is that in just that one store?

A. Just that one store.

Q. Is the word "division" another word for "department"?

A. Yes.

Q. How long have you been division manager of the plumbing and heating division of that store, sir?

A. About seven and a half years, seven years—since 1955, that I took over as division manager.

Q. So you held the same position in 1957?

A. That is correct.

Q. Do sales personnel of your division go to customers' homes in connection with the attempts of your division to sell plumbing fixtures?

A. Yes, sir, we try to do that in as many cases as possible.

* * * * *

800 Hearing Examiner Buttle: I think there is sufficient evidence on the record as a basis upon which I could rule that this witness is a hostile witness. I so rule.

Mr. Lipnick: Thank you, sir.

* * * * *

803 Q. And when your department operated in 1957, would you say that it sold a substantial amount of the plumbing fixtures which it did sell under arrangements which included installation?

A. Yes, sir.

Q. And would you also say that it sold a substantial number of the plumbing fixtures which it did sell under arrangements which did not include installation?

A. It ran around—in units—it ran around 60 to 40 per cent—60 per cent installed and 40 per cent over the counter, so to speak.

Q. Mr. Vernile, do you know the meaning of the term building projects?

A. I think I understand it.

804 Q. Well, let me ask you a question, then, which won't require you to know.

In 1957, did your store make sales only to individual homeowners as opposed to apartment building builders or

to a contractor who was putting up a large group of houses and was buying fixtures for all of them?

A. We sold just to the homeowners, not to projects.

Q. Did you ever sell anything on the basis of competitive bidding, in the sense of submitting a bid which would be publicly opened and the low bidder get the work?

A. No, we never have.

Q. Did you sell to anyone who walked into your department and wanted to buy?

A. Yes, sir.

* * * * * *

845 TED VOIGTSBERGER was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Hearing Examiner Buttle: Give your name and address to the Reporter, please.

The Witness: My name is Ted Voigtsberger, 2501 Horsham Road, Patboro, Pennsylvania.

Direct Examination by Mr. Depro.

Q. Is that a suburb of Philadelphia?

A. Yes, it is.

Q. And what is your occupation, Mr. Voigtsberger?

A. I am a division manager of Sears Roebuck.

Q. Of what store?

A. Currently at the Abingdon store, in Abingdon, Pennsylvania.

Q. Where is that?

A. That is also a suburb of Philadelphia, approxi-
846 mately 13 miles.

Q. Where were you in 1957? Were you in Abingdon?

A. In 1957 I was at Sears Roebuck in Germantown.

Q. How far is that from Philadelphia?

A. That is a part of Philadelphia, sir.

Q. What was your position with Sears in 1957?

A. I was a division manager of the plumbing department at that time.

Q. What were your duties in that capacity?

A. My duties were to get sales for the department, run the sales crew that I had.

Q. How many salesmen did you have under your employ?

A. At that time there were three.

Q. How long have you been with Sears, Mr. Voigtsberger?

A. I will have ten years this January.

Q. Now, what is the name of the line of plumbing fixtures that you sell?

A. In 1957, Homart.

* * * * *

862 Q. Now, could you tell us what percentage of the sales of plumbing fixtures that were made from your store in 1957 included installation provisions as against those that did not?

A. In my particular store, I would say that ap-
863 proximately 90 per cent of them would be on an installed basis.

Q. 90 per cent?

A. Yes, sir.

Q. Would that be so for 1957?

A. That's what I am referring to.

* * * * *

870 *Cross-Examination by Mr. Fruchterman.*

* * * * *

871 Q. When Homart products were sold on an installed basis, in 1957, what products would be included in the installation?

872 A. That could fluctuate, but naturally you would have to have your three pieces—generally have your three-piece ensemble.

Q. Does the three-piece ensemble consist of a tub, a water closet and a lav?

A. As part of it, yes, sir.

Q. And when you said fluctuate, did you mean that the various models would—within those broad classifications, the three broad classifications that I mentioned, could fluctuate? Or did you—

A. No, I meant that you could have a basic installation or an elaborate installation. You could have a basic three-piece ensemble installed, or you could do the whole complete bathroom.

Q. By the whole complete bathroom you mean—

A. Tile, medicine cabinet.

Hearing Examiner Buttle: And—or you could just put one piece of equipment in?

The Witness: Very rare, but you could, sir, yes.

Hearing Examiner Buttle: Well, did you ever do that?

The Witness: Install one piece of equipment? Not to my knowledge, sir, no.

* * * * *

873 Q. What was the average price of one of these installed bathroom sets during 1957?

A. Complete?

Q. Complete.

A. Well, complete, with your whole job, I would say about—between $800 and $900.

Q. Now, of that $800 or $900, what would be the average price of the three plumbing fixtures, without anything more—just the plumbing fixtures themselves, not including trim or anything else?

874 A. Not including trim?

Q. Yes.

A. This again would vary—whatever the color—

Q. Well, could you give an average figure?

A. About $175.

* * * * *

876 *Redirect Examination by Mr. Depro.*

Q. Mr. Voigtsberger, back in 1957, did customers come in sometimes and ask you for a price of a three-piece set, plus an installation, and you gave them the price?

A. After we went out to the home, yes, sir.

Q. You would go out to the home and then give them a price?

A. Yes, sir.

Q. Now, did you ever have any customers who, after

877 going out to their home and giving them a price, would ask for the price of just a three-piece set itself?

A. Yes, sir.

Q. Did you ever sell any customers on that basis, who installed or arranged for installation themselves?

A. Yes, sir.

Q. In 1957 did you do that?

A. Yes, sir.

Q. Well, in those instances where customers just purchased the set, a three-piece set, and arranged for their own installation, were such instances after you had given them a price including installation?

Mr. McAleer: I am sorry, Your Honor. I do not understand the question. Maybe the witness understands it.

Mr. Depro: Do you understand it?

The Witness: Yes, sir.

By Mr. Depro:

Q. Could you answer that question?

A. We sold it both ways, both times.

Hearing Examiner Buttle: I suppose sometimes they did and sometimes they didn't.

The Witness: Yes, sir, that is correct.

* * * * *

878 Q. Now, how did you arrive at that price?

A. Well, that would be your price less your trim —that is given to us by Chicago.

Q. During 1957, did you have sales from time to time in which your price of three pieces was lower than the usual price?

A. We would promote it some various times at a sale price.

Q. How often did you have sales?

A. How often did we have sales?

Q. In 1957.

A. Well—

Q. Did you have them as often as a month?

A. We had quite a few sales in Sears. I would say once a month we would have an advertisement in the papers featuring a bathroom.

Q. And how much lower would the price be for 879 three pieces during those sales?

A. Well, at times there would be no difference in price.

Q. The sale would be the same price that you had?

A. We would advertise a three-piece bath outfit, that's correct.

Q. And that would not be a sale price—that would just be your regular price.

A. I said at times.

Q. What happened in 1957?

A. Well—

Hearing Examiner Buttle: I'm puzzled now.

You say you have a sale and you sell it for the same price you were selling it before?

The Witness: Well, sir, he asked me a question whether we advertised that. We could advertise it.

Hearing Examiner Buttle: When you have a sale, you said you didn't advertise the price, is that it?

The Witness: At times, sir, no.

Hearing Examiner Buttle: At times. But when you did have a sale, was there a discount on the usual price?

The Witness: Yes, sir.

Hearing Examiner Buttle: Well, what was the percentage of this discount?

The Witness: Well, of course,—

Hearing Examiner Buttle: On the average—or 880 what was the lower range and what was the upper range?

The Witness: At that time—

Hearing Examiner Buttle: In 1957.

The Witness: We advertised—

Hearing Examiner Buttle: Well, forget that. I'm asking you a question. What was the percentage, if you know —the lower range and upper range of the percentage of discount?

The Witness: I would say about 15 per cent off the regular price, when we advertise—when we advertise the price, the sale price. I would say approximately 15 per cent.

Hearing Examiner Buttle: When you advertise the price itself.

The Witness: That's correct.

Hearing Examiner Buttle: That would be 15 per cent off $175?

The Witness: No, sir.

Hearing Examiner Buttle: 15 per cent of what?

The Witness: Well, sir, he asked me the question—

Hearing Examiner Buttle: Well, I'm asking you questions now.

The Witness: Well, we never advertised, your Honor, to my knowledge, less trim.

Hearing Examiner Buttle: You testified to that fact.

881 What I am trying to find out is when you had a sale, what was the amount of the discount.

The Witness. Approximately 15 per cent.

Hearing Examiner Buttle: So that would be 15 per cent of $175—approximately—which you said was the general average of a three-piece set, is that correct?

The Witness: No, sir. Maybe I'm misleading you, or maybe I do not make my point clear.

Hearing Examiner Buttle: We are passing each other some where.

What was the average price per set—$175—that was your testimony, wasn't it?

The Witness: That's without trim, sir, yes.

Hearing Examiner Buttle: That is without trim. And when you had a sale, it was 15 per cent off what, is what I am trying to find out.

The Witness: Well, we have always advertised with trim.

Hearing Examiner Buttle: Yes. Will you answer my question? 15 per cent off what?

The Witness: Off the complete ensemble.

Hearing Examiner Buttle: And what does the complete ensemble consist of—the trim as well?

The Witness: No, sir.

Hearing Examiner Buttle: All right. And what was

882 the price of the trim?

The Witness: Well, the trim would fluctuate depending on the quality that he would choose.

Hearing Examiner Buttle: $175 was without it.

The Witness: Right.

Hearing Examiner Buttle: I see.

By Mr. Depro:

Q. Mr. Voightsberger, did you make most of your sales of plumbing fixtures in 1957 as a result of the sales price or at the regular price?

A. Well, when you advertise, I would say at the sales price, it brings in more leads.

928 HARRY A. ARENSBERG was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Hearing Examiner Buttle: Give your name and address to the Reporter, please.

The Witness: Harry A. Arensberg, 426 Kaighns Avenue, Camden 3, New Jersey.

Direct Examination by Mr. Lipnick.

Q. Is that your business address, Mr. Arensberg?

A. Yes, sir.

Q. And what business is that?

929 A. We are in the wholesale plumbing supply business.

Q. What is the name of the company located at that address, sir?

A. Harry A. Arensberg.

Q. Are you the owner of that company?

A. Yes, sir.

Q. In 1957, did you handle plumbing fixtures in your business?

A. Yes, sir.

Q. In that year, from whom did you purchase the plumbing fixtures which you handled?

A. Universal-Rundle.

Q. Was that your only supplier?

A. That was the only supplier.

Q. Now, in what manner did you resell those fixtures? That is, did you sell them at retail, or did you sell them to contractors?

Mr. McAleer: I object, Your Honor. I believe he is leading the witness.

Hearing Examiner Buttle: Well, of course it sounds that way, but I do think the question would be difficult of construction unless there was some explanation. Going back to the question that was asked you, in what market do you sell?

The Witness: To the building trade and to the 930 plumbers.

Hearing Examiner Buttle: Yes.

By Mr. Lipnick:

Q. Do you know what the term "project" means?

A. Not necessarily.

Q. Well, in 1957 did you do any business with new construction which involved competitive bidding for sale and installation of multiple units for apartment houses or a large number of homes that were being built?

A. Yes. That is the general routine with the supply houses.

Q. Did you do a substantial portion of your business in that way?

A. No.

Q. Did you operate a part of your business as a DTU in 1957?

A. No, sir, at no time.

Q. Did you sell exclusively to plumbers and plumbing contractors?

A. Well, that covers a large territory. This question arises many times.

At the Mid-Atlantic Jobbers Association, which I happen to be a member of—Mr. Breck, who was president of the Hajoca Corporation at that time—we used to converse in regards to that, and the only terminology that I can
931 give him on that question was that a wholesaler today will sell anybody who walks into their store, regardless, but a DTU is one who actually advertises and partially installs by engaging a plumber to do such work, or they might have a crew of men to do that work. But mainly in advertising.

Q. Well, did you understand DTU to refer to a plumbing business which advertised and which did installation work?

A. That would be a DTU.

Q. Well, in 1957, did you advertise?

A. Never in my life, ever since I have been in business, have I advertised.

Q. In 1957, did you do any installation work?

A. Never in my life.

Q. In 1957, did you sell exclusively to plumbers and plumbing contractors?

A. There isn't a supply house in the country that I would dare say, including Crane, which is supposed to be well known for that, but they would sell anybody who would walk into their place at the same prices as a plumber would pay or a contractor would pay for it.

Q. And did you do that in your own business?

A. Yes, sir, I followed the same pattern as the rest of them, because actually the truth of the matter is when I first went into business in 1937, I refused to sell anybody

unless they showed me a journeyman's license, and I
932 found out very shortly that I come near going through the wall. In checking over my other supply dealers, I found that my colleagues were selling anybody over the counter. So I changed my pattern.

Q. Mr. Arensberg, in 1957—directing your attention to 1957, can you state with reasonable certainty what proportion of your sales of plumbing fixtures were made to plumbers and plumbing contractors?

A. I would say around 75 per cent of my business was between that.

Q. And can you state with reasonable certainty what proportion of your sales of plumbing fixtures were made to the projects—that is multiple unit construction?

A. The manufacturing end of it, you are referring to?

Q. Of the plumbing fixtures that were sold to multiple unit construction.

A. Well, the plumbing fixtures would constitute a tub, a basin and—

Q. No, no. I do not think you understood the question. You said that about 75 per cent of your business was done with plumbers and plumbing contractors.

A. Yes.

Q. Now, can you state with reasonable certainty what portion of your business was done with multiple unit construction?

933 A. I still don't follow that.

Hearing Examiner Buttle: You do not understand the question?

The Witness: I do not understand that question.

Hearing Examiner Buttle: All right, reframe the question.

Mr. Lipnick: Very well.

By Mr. Lipnick:

Q. Did you sell any plumbing fixtures to builders who were putting up apartment buildings in 1957?

A. Yes.

Q. And what proportion of your total plumbing fixtures business did that represent?

A. I would say around 25 per cent.

Q. Well, did you sell any plumbing fixtures in 1957 to builders who were putting up housing developments?

A. No, sir.

Q. Did you sell any plumbing fixtures in 1957 to people who just walked into your store, but who were not plumbing contractors, who were not plumbers, and who were not builders?

A. Yes, about 25 per cent of those. There were 50 per cent of the plumbers we sold to.

Q. 50 per cent of your business was with plumbers?

A. With plumbers.

934 Q. And can you state that with reasonable certainty, that it was 50 per cent, rather than the 75 per cent figure you mentioned a little earlier?

A. Yes, that's right.

Q. Are there any other people in your locality who are engaged in the same or similar business as yours, or who were so engaged in 1957?

A. In 1957 there was only one competitor. He done extensive advertising. That was Henry Schreibstein. He trades under Henry Supplies.

Q. Was he located near you?

A. Yes—in the same block.

Q. Were there any other plumbing supply houses located in your vicinity in 1957?

A. There was one other at 336 Kaighns Avenue, trading under Kaigns Avenue Plumbing Supplies. Now, that is our block you are talking about.

Q. Well, not necessarily in your block—but within, say, walking distance.

A. Yes, 336 Kaighns Avenue.

Mr. Lipnick: May we have your indulgence for just a moment?

By Mr. Lipnick:

Q. Were there any other plumbing supply houses in 1957 that you considered competitors?

935 A. Yes.

Q. And which ones were they?

A. Well, we had J. D. Johnson, we had Fleck Company, we had Hajoca Corporation, and we had Mott Company of Pennsylvania.

Q. Would you describe for us, please, sir, the competition which you encountered in your sales of plumbing fixtures in 1957?

Mr. Fruchterman: I object, your Honor. He has answered. He named his competitors.

Hearing Examiner Buttle: What?

Mr. Fruchterman: He has already named his competitors, sir. He has discussed what the various classifications were already. The question is redundant.

Mr. Lipnick: I will withdraw the question and reframe it, sir.

By Mr. Lipnick:

Q. Mr. Arensberg, in 1957 did you feel, or did you believe, that you were required to do certain things in order to sell plumbing fixtures to your prospective customers?

Mr. Fruchterman: Objection, your Honor. The question is unintelligible.

Hearing Examiner Buttle: Yes—what he believes—it is not relevant. Sustained.

By Mr. Lipnick:

936 Q. Mr. Arensberg, in 1957, as a matter of fact, what did you do in order to sell plumbing fixtures and to promote your sales of plumbing fixtures to your customers?

Mr. Fruchterman: Objection. Still leading.

Mr. Lipnick: I do not see what that is leading. A leading question suggests an answer.

Hearing Examiner Buttle: In the course of your business, like everyone else, you took certain means to promote sales, did you not?

The Witness: That's right.

Hearing Examiner Buttle: What means did you take?

The Witness: That would be only in the line of brass goods, the trims of the fixtures, that is all.

Mr. Lipnick: And what's—

Hearing Examiner Buttle: What means did you take?

The Witness: As far as your three-piece bathroom is concerned, your prices would be the same in all manufacturers. In order to try to make a sale, you would try to use a type of brass goods cheaper than what our competitors would use.

By Mr. Lipnick:

Q. What would be the purpose of using that type of brass goods?

A. Because of competition.

Hearing Examiner Buttle: So you could undersell 937 your competitors, is that it?

The Witness: That's right.

By Mr. Lipnick:

Q. In 1957, sir—Mr. Arensberg, do you know whether or not your competitors sometimes undersold you in 1957?

Mr. Fruchterman: I object, your Honor. He has an-

swered this question already. This is his witness. Now he is trying to impeach his testimony.

Hearing Examiner Buttle: That is not impeaching.

Mr. Lipnick: I object to Mr. Fruchterman's attempt to read my mind.

Hearing Examiner Buttle: That is not even a reasonable construction of the question. There is nothing about that question that impeaches his testimony.

Mr. Fruchterman: If your Honor please, may we approach the bench?

Hearing Examiner Buttle: Oh, well, it is so unimportant —no. You may answer the question.

By Mr. Lipnick:

Q. Do you know whether or not your competitors ever undersold you in 1957?

A. That's possible.

Mr. McAleer: Pardon me?

The Witness: That is possible.

By Mr. Lipnick:

938 Q. Mr. Arensberg, I will show you what has been received in this case as Commission's Exhibit 76. I will ask you if you have seen that before.

May we be off the record for just a moment?

Hearing Examiner Buttle: Yes.

(Discussion off the record.)

Hearing Examiner Buttle: On the record.

By Mr. Lipnick:

Q. Mr. Arensberg, I will show you Commission's Exhibit 75 and ask you if you have ever seen that before.

A. It is a Universal-Rundle price book, wholesale price book.

Q. Have you seen that before today, sir?

A. No, sir. This is a '56.

Mr. Fruchterman: If your Honor please, this came in under the subpoena because while this was published in 1956, it was in effect during part of 1957.

The Witness: I have the 1957 with me.

Mr. Lipnick: May I see what you have with you?

Hearing Examiner Buttle: As I recall, this covers most of the year 1957, does it not?

Mr. McAleer: Those prices were in effect during a portion of 1957. Then there were price changes during the year. There was a price change in March, a price change in July.

939 The Witness: Judge, can I say something? The booklet we have for '57, the price structure of that goes into effect a month or two months prior to when we get this book, by sending us a notification on it.

By Mr. Lipnick:

Q. Mr. Arensberg—

Mr. Lipnick: Mr. Examiner, I am about to show the witness what counsel has conceded to be a copy of Commission Exhibit 76.

By Mr. Lipnick:

Q. Mr. Arensberg, I will show you this document now, which is a copy of Commission Exhibit 76, and I will ask you to look—I will ask you if you are familiar with the contents of that document.

A. Very much so.

Q. Can you state with a reasonable degree of certainty whether or not in 1957 you purchased each and every product listed in that price book?

A. Yes, sir.

Q. And did you purchase every one?

A. Every one.

Hearing Examiner Buttle: Now, this is in evidence?

Mr. Lipnick: Yes, sir.

The Witness: Can I mention something?

By Mr. Lipnick:

940 Do you want to explain your last answer?

A. Yes. It came to my mind—I would have to see one of my bills, because I think we got a confidential five off of this. But I am not sure. In other words, to verify that, I would have to see one of my bills at that time.

Hearing Examiner Buttle: What?

The Witness: I believe we got an extra five per cent beyond this, a confidential five.

Hearing Examiner Buttle: A confidential five?

The Witness: Yes, sir.

Hearing Examiner Buttle: Five per cent discount are you talking about?

The Witness: Yes, sir.

By Mr. Lipnick:

Q. Your invoices for the year 1957 would show whether or not you did, would they not?

A. That's right.

Q. And as opposed to your invoices, can you state with reasonable certainty, without looking at them, that you did in fact receive a confidential five?

A. I believe so. I am not sure.

Hearing Examiner Buttle: Now, when you say you are not sure—you mean you just do not know, or you cannot state with reasonable certainty that you did?

The Witness: Well, a reasonable certainty—I think 941 we have received an extra five.

By Mr. Lipnick:

Q. Would your invoices—

A. Would show that.

Q. —accurately show whether you did or not?

A. Yes, sir.

Q. And would the technique to determine that be to compare the invoice price with the prices for that year?

A. Yes, sir.

* * * * *

957 By Mr. Lipnick:

Q. Now, Mr. Arensberg, in 1957 do you recall whether or not Universal-Rundle offered a 2 percent cash discount?

A. As far back as I can remember we always took a 2 percent discount when we paid our bills on the 10th of the month.

Q. Has it always been your practice to take a 2 percent discount when they are available?

A. Yes, sir.

Q. Why is that?

A. That has been the policy.

Q. Well, is there any reason for that policy?

A. None whatsoever.

Q. Do you always take advantage of cash discounts which might be offered on equipment which you purchase?

A. We try to take as much as we possibly can. May I go further? That is more or less of an incentive to meet the obligation, because should you not take your discount over a period of time they might eventually say, well, we
958 can't sell you any more or something like that. But we have always taken our 2 percent discount in every case we possibly could with other manufacturers also besides Universal-Rundle.

Q. Mr. Arensberg, in 1957, did you maintain a show room?

A. Yes, sir.

Q. How large was it?

A The show room was exactly about 30 feet wide and about 50 feet deep.

Q. And did you have any warehouse facilities?

A. Yes, sir.

Q. Was that all in the same building?

A. No, sir.

Q. How many buildings were you in?

A. Two.

Q. Did you rent or own?

A. Own.

Q. Did you employ any salesmen in 1957?

A. We had one salesman in the store, countermen, my wife and myself.

Q. Did you employ any people to work in your warehouse?

A. No, sir.

Q. Did you have any office help?

A. No, sir.

Q. Did you run any trucks?

A. One truck.

959 Q. Did you employ a driver?

A. Yes, sir.

* * * * *

Cross-Examination by Mr. Fruchterman.

969 Q. Mr. Arensberg, did you maintain an inventory of Universal-Rundle products in your store or in your warehouse during 1957?

A. Yes, sir.

Q. Mr. Arensberg, isn't it a fact that when ordering from Universal-Rundle in 1957 almost every order you placed was for either one or a maximum of two fixtures of the same type on any given order?

A. That is right, that is to fill in the break; the regular merchandise that was taken out from the inventory.

Q. Isn't it a fact that almost everyone of your orders was placed for delivery within a day or two?

A. No, not necessarily.

Q. Could you look at your invoices and tell us?

A. I can tell by my inventory sheets. In other words, if I had 10 tubs of one style and I am taking one or
970 two out on delivery I will pick out one or two to replace it to keep my present inventory up to par.

Q. Perpetual inventory?

A. Yes.

Q. Now, in one time you must have ordered in truckload quantities to build this inventory up?

A. No, I never bought truck load lots at all in my life. I might buy five or six tubs at a time but that is not truckloads. When you refer to truckloads you are going back around a good many years.

Q. Would you ever buy five or six tubs of the same model?

A. It could be possible.

Q. On the same day?

A. It could be possible.

Q. Did you ever do so in 1957?

A. I don't recall in 1957 but it could be possible.

Q. Isn't it a fact, Mr. Arensberg, that the products which you were buying from Universal-Rundle in 1957 you ordered specifically to fulfill an order placed by a plumber customer?

A. No, because in '57 I could have probably shipped them; and by the same token, if a plumber wanted Kohler I would have given him a Kohler; and if he wanted American Standard I could get him any brand he wanted if he wanted a particular brand.

971 Q. Then your testimony on direct examination that you handled only Universal-Rundle—

A. That was my article, Universal-Rundle.

Q. Now, your testimony that you handled only Universal-Rundle was not correct, was it?

A. Yes, it is correct.

Q. Didn't you testify you are in a position to give them Kohler or Standard?

A. Well, there is no jobber in the world who sticks to one brand. If he gets a request for a certain particular make he will get it. But his main brand is whatever brand he handles, and my main brand at that time was Universal-Rundle.

Q. And when a plumber came in and asked for a certain fixture in Universal-Rundle you would get it to him.

A. I would have it for him. I would have it in stock.

Hearing Examiner Buttle: If he asked you for any other brand would you have it in stock?

The Witness: No, sir.

Hearing Examiner Buttle: What you are saying is Universal-Rundle—

The Witness: Is my main brand.

Hearing Examiner Buttle: —is the only product in connection with which you kept and inventory; is that what your testimony is?

The Witness: That is right, sir.

972 By Mr. Fruchterman:

Q. Did you know that Universal-Rundle gave an added discount for truckload lots purchased in 1957?

A. I don't know what they done in 1957 for truckloads because I never bought a truckload from Universal-Rundle.

Q. But you know you could have gotten truckload prices?

A. I don't know that, I can't answer that because I have never bought it. What they might do with some other supplier to buy a truckload I don't know. I can't answer that. You would have to ask them for that.

Q. Did you ever buy a Bidet in 1957 from Universal-Rundle?

A. Not that I remember.

Q. Did you ever buy marine lavs in 1957 from Universal-Rundle?

A. We carry that in stock.

Q. What is a marine lav?

A. Smaller lav 12 by 12 or 14. It can be perfectly straight or corner, a marine lav.

Q. Why is it called a marine lav?

A. Because of its size and it is made out of vitreous china.

Q. Did you ever buy any hoppers from them in 1957?

A. Sure.

Q. What is a hopper?

A. A toilet. It can be a bowl or it can be a tank 973 and bowl. They term it a hopper.

Q. You are thoroughly familiar with the Universal-Rundle line as it was offered in 1957, are you not?

A. Yes.

Q. And you say that there is no functional distinction between a hopper and a reverse trap bowl or a washdown bowl or a siphon jet bowl?

A. A washdown bowl is one thing and a reverse is something else, and a siphon jet is something else. There are three different categories there.

Q. And you don't consider a hopper any different from those three?

A. Well, there is a difference in pattern, sure.

Q. There is no difference in function?

A. Oh, yes, there is a little difference in function, sure, there is.

Q. What is the difference in function?

A. One, the washdown, goes up towards the front and goes down through the back. The reverse flushes faster, goes to the back and right out. And the reverse bowl holds more water in the bowl.

Q. You certainly bought hoppers?

A. Yes.

Q. They were labelled hoppers?

A. None of them are labelled hoppers.

974 Q. Universal-Rundle doesn't make a product labelled hoppers?

A. No, sir. They might term it in the catalogue here but their crates are not hoppers. They go by stock numbers.

Q. I show you now a copy of Commission's Exhibit Number 74, and on page 18 I call your attention to the product depicted on there labelled a hopper.

A. Well, that is a hopper that is not used by an ordinary person in a home. I never sold one of these things here. That is the old-fashioned outside hopper.

Hearing Examiner Buttle: What Exhibit Number are you referring to?

Mr. Fruchterman: Page 18 of Commission's Exhibit 74, sir.

The Witness: You will find that in the old days.

By Mr. Fruchterman:

Q. Isn't the difference, sir, the other type of bowl used on water closets are in reality traps?

A. Yes, they are termed as traps.

Q. And a hopper is not a trap, is it?

A. No, sir; that is not a trap; that is a straight flush down; straight on down.

Q. There is a basic functional difference, isn't there?

A. Sure there is, according to the picture there is, yes.

Q. Do you know what a flow out bowl is?

975 Hearing Examiner Buttle: The type in the picture is not used in homes?

The Witness: No, sir.

By Mr. Fruchterman:

Q. And you never sold them?

A. No, sir.

Q. Do you know what a blow out bowl is?

A. Well, a blow out bowl can be either a reverse trap or it can be a siphon action or washdown.

Q. Did you ever sell a blow out bowl during 1957?

A. We sold all kinds of bowls.

Q. Can you say that you sold a blow out bowl manufactured—

A. They might term it as a flow out bowl. A blow out bowl can be one of these prison bowls, one that hangs up on the wall. It can either be flushed out through the rear or through the top, but mostly through the rear.

Q. Did you sell one in 1957 made by Universal-Rundle?

A. Not that I remember.

976 Q. Do you know, or did you know whether or not in 1957 Universal-Rundle Corporation manufactured a one-piece toilet, that is the tank and bowl combined in one casting?

A. That was called the Como.

Q. Do you know whether you bought one of those from Universal-Rundle or not in 1957?

A. Well, I cannot tell you whether I bought one in 1957 or not, but we have bought them.

Q. Well, in your testimony on direct examination that you bought every product in the Universal-Rundle line, it was not very accurate, was it?

A. Well, now, I didn't say that now. I said I bought Universal-Rundle merchandise, saleable merchandise.

Hearing Examiner Buttle: Let me hear this question. Would you read the question, Mr. Reporter?

(The Reporter read the question as follows:

"Question: Well, in your testimony on direct examination that you bought every product in the Universal-Rundle line, it was not very accurate, was it?")

The Witness: Well, I bought the line that the plumbers and the trade would use, the builders would use. That is the only line that I would have bought. Where do I come in to sell marine stuff, or prison stuff? He is bringing into me prison stuff; well, I never sold prison stuff
977 in my life, so I would not stock it. And I doubt very much if any of the jobbers would stock prison stuff, or the marine supplies, would stock it, in the plumbing supplies—they would order it in—unless they have business in the marine department. But I would never have a call for it.

By Mr. Fruchterman:

Q. You testified that you competed with the Mott Company, did you not?

A. In the household fixtures, tubs, wash basins, and hoppers, toilets, kitchen sinks—that is all we carry—that is all we compete with.

Q. Well, is your testimony that sometimes you compete with them and sometimes you do not, as far as the Mott Company is concerned?

A. No, we compete with all of them.

Mr. Lipnick: I object.

Hearing Examiner Buttle: Yes. Sustained.

Mr. Lipnick: I move that whatever part of that answer was transcribed be stricken.

Hearing Examiner Buttle: I do not think there was—there wasn't any part of the answer I heard.

Would you read it Mr. Reporter?

(The Reporter read the answer as follows:

"Answer: No, we compete with all of them.")

Hearing Examiner Buttle: All right. Strike it.

* * * * *

999 By Mr. Fruchterman:

Q. What were some of the building projects which you supplied the fixtures back in 1957, Mr. Arensberg?

A. I don't remember now.

Q. Do you actually recall whether there were any building projects for which you supplied the fixtures?

A. I do not know what you term as building projects.

Hearing Examiner Buttle: You do not understand the question?

The Witness: No.

By Mr. Fruchterman:

Q. Have you ever heard of Levittown?

A. Yes.

Q. You realize that that is one builder who goes and builds a lot of houses there?

A. Yes, sir.

Q. He is a pretty large builder, is he not?

A. Yes, sir.

Q. Have you ever heard the termination "housing project" used in connection with—to describe the operations of a builder, such as Levitt?

1000 A. Yes.

Q. Now, do you know what I mean by a housing project?

A. Yes.

Q. Or projects generally?

A. Yes.

Q. Can you name any projects which you supplied the fixtures for back in 1957?

Hearing Examiner Buttle: Is that what you mean, Mr. Fruchterman?

Mr. Fruchterman: Housing projects, yes.

Hearing Examiner Buttle: Well, why didn't you tell the witness that, instead of going into Levittown.

Go ahead.

By Mr. Fruchterman:

Q. Did you ever request Universal-Rundle to submit prices to you for a specific new construction job?

A. No, sir.

Q. You have never done that?

A. No, sir.

* * * * * *

1001 By Mr. McAleer:

Q. Mr. Arensberg, I believe you testified on direct examination that approximately 50 per cent of your sales of plumbing fixtures in 1957 were made to plumbers and plumbing contractors, is that correct?

A. Well, plumbers and plumbing contractors is the same thing.

Q. I understand that, sir. But I think the question elicited the fact that you sold plumbers and plumbing contractors.

A. Yes.

Q. There is no basic difference between a plumber and a plumbing contractor, is there, sir?

A. No.

1002 Q. Mr. Arensberg, in selling plumbing fixtures to plumbing contractors, was it usual in 1957 that the sale of those fixtures would be in three-piece sets?

A. Not necessarily.

Q. Do you know, sir, of your own knowledge what type of installation the plumbing contractor customers may have been making of the plumbing fixtures purchased from you?

A. No, I do not.

Q. Do you know, sir, whether or not the plumbing contractors would be engaged in remodeling bathrooms?

A. That I cannot answer, I do not know.

Q. Do you know, sir, whether or not the plumbing contractors might be engaged in new construction or building of residences?

A. I would not say so. I would not know that.

Q. Could you state with a reasonable degree of certainty, sir, that in 1957 a substantial portion of your sales to plumbing contractors were in three-piece sets?

A. No, I could not say that honestly. I do not know—any more than it would be prior to 1957 or even after 1957.

Q. Sir, you testified on direct examination that approximately 25 per cent of your sales in 1957 were made to commercial projects. Now, directing your attention to sales to commercial projects, would you say, sir, that those—the sale of plumbing fixtures to that category of customer would substantially be in three-piece sets?

1003 A. When you say commercial, what do you mean by commercial?

Q. Sir, on direct examination you referred to a portion of your customers as selling to commercial projects,

A. I did not use the word "commercial" at all in any of my testimony.

Hearing Examiner Buttle: Don't argue with counsel. Respond to the questions—or indicate you do not understand the questions.

Mr. Lipnick: Well, Mr. Examiner, I am going to have to object to that direction to the witness, because my recollection of his testimony on direct examination coincides with the witness' recollection of his testimony.

Hearing Examiner Buttle: Are you contending, Mr. Lipnick, that the witness' answer does not have to be responsive to the interrogation by counsel?

Mr. Lipnick: I am contending this, sir—

Hearing Examiner Buttle: Because that is all I am contending.

Mr. Lipnick: I am contending, sir, that you instructed the witness that his previous answer was not responsive to the question. However, the question refers specifically to

testimony which the witness gave on direct examination in which the witness was told by counsel that he referred to commercial projects in his testimony. The answer which the witness gave was that he did not refer to commer-
1004 cial projects in his testimony. And since, as a matter of fact, I feel sure that an examination of the record will reveal that the witness is correct—

Hearing Examiner Buttle: Do you object to the question?

Mr. Lipnick: I do not object to the question because the witness is very able to protect himself. I raised a similar objection at a previous hearing, and you indicated that the question was not improper. But what I do—

Hearing Examiner Buttle: Well, as a matter of fact, it was not a question. If it is incorporated in a question, in that case it is all right. But this statement was not incorporated in a question. So it was not all right, and you should have objected, which you didn't do. Your objection is overruled, because the statement was incorporated in a question, and the witness was asked whether or not he made a certain statement. This was a mere assertion by counsel that he made the statement. That is the difference between my ruling before and this time.

Mr. Lipnick: In that case, sir, I will move to strike the question and the answer.

Hearing Examiner Buttle: All right. Let's start over again.

By Mr. McAleer:

1005 Q. Mr. Arensberg, on direct examination I believe you indicated what proportion of your total sales in 1957 were resold by you to particular types of customers, did you not?

A. Yes.

Q. Could you refresh my recollection, Mr. Arensberg,

as to what proportion of your total sales went to various categories of customers?

A. I mentioned as before there was 25 per cent to the building trade, 50 per cent to the plumbing trade, and around 25 per cent to the individuals.

Q. What do you mean, sir, when you refer to the building trade?

A. People who are building homes, individual homes.

Q. You sold direct, sir, to the persons that were building their own homes?

A. No, sir. I said to the builder, who was building the home—sold him.

Q. So that on 25 per cent of your sales, sir, that was sold to the building trade, you would have sold three-piece sets, is that correct, sir?

A. Yes.

Q. Now, in order to be a wholesaler of plumbing fixtures, Mr. Arensberg, is it necessary for you to carry a representative line of plumbing fixtures to service your plumbing contractors?

1006 A. Yes, sir.

Q. Is it necessary for you, sir, to carry five-foot bathtubs?

A. Five-foot bathtubs in our term of operations is the same as a grocery store having sugar.

Q. Would you also give the same characterization to a four and a half foot bathtub?

A. No, sir—not where I am located.

Q. I see, sir. Then you would say that a four and a half foot bathtub is not as important to you as a five-foot bathtub?

A. In my sales, no. The request is very little.

* * * * *

1018 *Redirect Examination by Mr. Lipnick.*

* * * * *

1023 Q. In 1957, sir, did you ever ask Universal-Rundle to give you a truckload price?

A. No, sir.

Q. Did they ever offer you a truckload price in 1957?

A. Well, in 1957 I could not answer that intelligently.

Q. If you cannot state with reasonable certainty, don't answer.

* * * * *

1027 Q. Do your customers sometimes buy bathroom fixtures in single units as opposed to three-piece sets?

A. Many times.

Q. Was the same thing true in 1957?

A. Way back.

Q. In 1957, sir, in connection with your sales to the building trade, did you sometimes sell two-piece sets for powder rooms?

A. Yes, sir.

Q. If you were to lose your source of supply for four and a half foot tubs and be unable to procure another one, would the profitability of your business be affected?

Mr. Fruchterman: Objection. Your Honor, before he can ask a hypothetical question, there has to be some foundation in fact for the hypothetic question.

Hearing Examiner Buttle: Read the question to me.

(The Reporter read the question as follows:

"Question: If you were to lose your source of supply for four and a half foot tubs and be unable to procure another one, would the profitability of your

1028 business be affected?")

Hearing Examiner Buttle: Objection sustained—not for that reason.

By Mr. Lipnick:

Q. In 1957, did you sell four and a half foot tubs, sir?

A. It could be possible.

Q. I show you Commission Exhibit 80-B, and I would invite your attention to the top line in connection with the products listed. I would invite your attention to the top line. I will ask you whether that refreshes your recollection of whether or not in 1957 you purchased four and a half foot bathtubs from Universal-Rundle.

A. Yes, sir.

Q. Did you sell four and a half foot bathtubs in 1957?

A. According to the bill, I have.

Q. When you sold four and a half foot bathtubs, did you sell them at a profit?

A. Yes, sir.

Q. When you sold corner tubs, did you sell them at a profit?

A. Yes, sir.

* * * * *

1031 Q. Mr. Arensberg, when Universal-Rundle first came out with their 14-inch tub, did you receive any sales literature or bulletins from them about the 14-inch tub?

A. Yes, sir.

Q. And did that literature or bulletin state what the purpose of the 14-inch tub was?

A. No, sir.

Q. What did that literature emphasize, if anything, about those tubs?

A. Price structure.

* * * * *

1037 ARTHUR MIGNOGNA, was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Hearing Examiner Buttle: Give your name and address to the Reporter.

The Witness: Arthur Mignogna, 132 Avondale Avenue, Haddonfield.

Direct Examination by Mr. Depro.

Q. What is your business, Mr. Mignogna?

1038 A. I am vice-president of Central Supply Company.

Q. And where is Central Supply Company located?

A. Right now it is 429 Kaighn Avenue, Camden.

Q. And is that in Camden, New Jersey?

A. Camden, New Jersey.

Q. What is the business of the Central Supply Company?

A. Plumbing and heating supplies.

Q. And how long has the business been in operation?

A. Since '42.

Q. Is it a New Jersey corporation?

A. Yes, it is.

Q. And do you have any other places of business other than the Kaighn Avenue address?

A. Yes, we have one at 337 South Broadway in Gloucester.

Q. Gloucester?

A. That is a branch store.

Q. Is that in New Jersey?

A. Yes, it is.

Q. Where is Gloucester located, how far from Camden?

A. Three miles from Camden.

Q. Three miles?

A. Yes.

Q. Now, in the course of your business did you purchase plumbing fixtures from Universal-Rundle in 1957?

A. I believe we did.

1039 Q. And how would you describe your business insofar as the method of selling is concerned?

A. What do you mean?

Q. I mean are you in the wholesale or retail business?

A. We are in the wholesale business.

Q. Wholesale business?

A. That is right.

Q. Do you meantain a display of plumbing fixtures on the premises of your store?

A. Yes.

Q. Do you sell at retail if people come in to buy?

A. Occasionally.

Q. Occasionally you do?

A. Yes, sir.

Q. Who are your wholesale customers?

A. I would consider a wholesale customer a registered plumber.

Q. Would that be so in 1957?

A. It has always been so.

Q. Now, did you have occasion in 1957 to sell the plumbing fixtures of other manufacturers other than Universal-Rundle?

A. Yes.

Q. Did you stock the products of anyone else other than Universal-Rundle?

A. No.

1040 Q. Have you ever sold—Do you know what a project sale is, Mr. Mignogna?

A. Yes.

Q. Would you tell us what that is, what your understanding is?

A. A project sale?

Q. Yes.

A. Well, you probably mean a series of units, maybe a dozen homes or maybe a dozen or so or more, or maybe some motels or apartment houses. I would consider that a project.

Q. Did you have any such sales in 1957?

A. No.

Q. You did not?

A. No.

Q. Could you tell us what proportion of your business percentage-wise in 1957 was derived from the sale of plumbing fixtures?

A. It is pretty hard to determine.

Q. Pardon.

A. It is pretty hard to determine how much was in plumbing fixtures.

Q. Could you make a reasonable approximation percentage-wise?

A. I would say on a minimum of ten or twelve-thousand dollars. That is the fixtures. Now, you are talking about fixtures?

1041 Q. Yes.

A. I would say a minimum of ten or twelve-thousand dollars.

Q. For 1957; is that right?

A. I believe, yes, as near as I can remember.

Q. Now, could you tell us, Mr. Mignogna, in the sale of plumbing fixtures to your wholesale customers whether a price was an important factor?

Mr. McAleer: I object, your Honor.

Hearing Examiner Buttle: Let him finish the question. Is that the question?

Mr. Depro: Whether the price was an important factor in the sale of plumbing fixtures.

Hearing Examiner Buttle: To whom?

Mr. Depro: To the plumbers who were purchasers or prospective purchasers of Central Supply Company.

Hearing Examiner Buttle: The objection is sustained. You can pursue it but ask another question.

By Mr. Depro:

Q. Will you tell us, Mr. Mignogna, what factors were important in the purchasing of plumbing fixtures from your company in 1957?

A. I don't think I was with you.

Q. Pardon.

A. I don't think I was with you.

Hearing Examiner Buttle: Read the question.

1042 (The pending question was read.)

The Witness: Do you mean the factors like who our sources of supply were?

By Mr. Depro:

Q. No, I mean those factors that were important in the sale of the plumbing fixtures to your wholesale customers in 1957; and I am speaking of Universal-Rundle fixtures which I understand you sold in 1957; is that correct? You sold Universal-Rundle fixtures?

A. Yes.

Q. What factors were important to the sale of those fixtures?

A. Do you mean price?

Q. Well, was that one of the factors?

A. Well, that is the important factor.

Q. What did you say?

A. That is an important factor.

Q. An important factor?

A. Yes.

Q. Was it important in 1957?

A. It is always important.

Q. Did your company experience any competition from —Strike that. What was the sources of competition in the sale of plumbing fixtures that you experienced in 1957?

A. Well, my immediate competitors were Henry Supply and Harry Arensberg. All of the plumbing supply
1043 houses in the area were competitors.

Q. What area are you speaking of?

A. Well, the Camden area.

Q. Do you have any competition from plumbing supply houses in Philadelphia?

A. Some, yes, sir.

Q. Did you have competition from any other sources than the ones that you mentioned in 1957 in the sale of plumbing fixtures?

A. Yes, we did have some competition from Sears.

Q. What was the nature of that competition, would you tell us?

A. Well, customers would come in and say they could buy it cheaper at Sears.

Q. Did you lose any business as a result of those?

A. No doubt we did. I can't say for sure that they went to Sears and bought it. People would come in and shop around and if they didn't like our price they would say they could buy it cheaper in Sears, but I can't say they actually went there and bought it. I don't know for a fact that they did.

Q. Mr. Mignogna, in respect of the prospective customers who told you in 1957 that they could buy cheaper from Sears, did some of those customers refrain from buying from you?

Mr. McAleer: I object, your Honor. I think he
1044 answered the question. He said he didn't know.

Hearing Examiner Buttle: Yes, sustained.

Mr. Lipnick: If your Honor please, this is not quite the same question. This question is only asking him whether there were some people who said they could buy it cheaper elsewhere who did not buy from him. This is not asking him whether he lost any sales. This is asking him something which he might well know.

Hearing Examiner Buttle: Some people said what?

Mr. Lipnick: The witness testified that some people came into his store and said they could buy plumbing fixtures cheaper at Sears.

Hearing Examiner Buttle: And he said he didn't know whether or not they did buy it at Sears.

Mr. Lipnick: We are not asking him now whether they bought from Sears, we are just asking him if there were many people who said they could buy cheaper from Sears who ultimately did not buy from him.

Hearing Examiner Buttle: Well, is that so?

The Witness: No, they did not buy from me.

Hearing Examiner Buttle: He explained what he meant by loss of business. He said before they stated they could buy from Sears cheaper and he stated he may have lost the business to Sears. All right, go ahead.

* * * * *

1045 Q. Mr. Mignogna, in 1957 what plumbing fixtures or what products did you handle in the Universal-Rundle line?

A. In the Universal-Rundle line?

Q. Yes.

A. We handled all their tubs, their toilets, their lavatories, kitchen sinks, almost everything that they manufactured.

Q. Did you have a warehouse at the premises?

A. Yes, sir, we did.

Q. And did you display the products on your floor?

A. Yes, we did.

Q. Now, did you take advantage of cash discounts from Universal-Rundle during 1957?

A. We always discounted.

Q. What was the rate of the discount?

A. The cash discount was two percent.

Q. Did you take advantage in all of your purchases of supplies of the cash discount in 1957?

A. Always.

Q. Was it important in the operation of your business?

Mr. Fruchterman: Objection. He is leading the witness.

Hearing Examiner Buttle: Yes, sustained.

By Mr. Depro:

Q. Will you tell us why you took advantage of the 1046 cash discount on your purchases of the supplies?

A. Well, it meant a lot of money to us. It was very important that we discount our bills because that is probably where our profit lied.

Mr. McAleer: I move to strike the answer as being purely speculative.

Mr. Depro: I would like to ask his basis.

Hearing Examiner Buttle: What was his reply? I didn't hear it clearly. Read the answer, Mr. Reporter.

(The answer was read.)

By Mr. Depro:

Q. What do you mean by that, Mr. Mignogna?

Mr. McAleer: I have an objection that the Examiner hasn't ruled on yet, Mr. Depro.

Hearing Examiner Buttle: Was your profit exclusively based on that?

The Witness: Not exclusively.

Hearing Examiner Buttle: But in part.

The Witness: In part.

Hearing Examiner Buttle: Well, let's not argue about that. You can practically assume that to be the case.

By Mr. Depro:

* * * * *

1048 By Mr. Depro:

Q. Mr. Mignogna, did you advertise plumbing fixtures in 1957?

A. I don't believe we did.

Q. You did not?

A. No.

* * * * *

Cross-Examination by Mr. McAleer.

Q. Mr. Mignogna, you testified on direct examination that approximately twelve-thousand dollars represented the sales of plumbing fixtures; is that correct, in 1957?

A. I think.

Q. What was your total volume of sales in 1957?

A. The total volume of sales in '57?

Q. Yes.

A. I don't know.

Q. Could you give me an estimate to a reasonable degree of certainty what that might be?

A. Do you mean when I said about the plumbing fixtures?

Q. Yes, you gave to him on direct examination about ten to twelve-thousand dollars worth of your sales in 1957 were plumbing fixtures.

1049 A. Yes, because I think that our bills always ran over a thousand-dollars.

Hearing Examiner Buttle: Well, do you know what your total business was in plumbing fixtures in 1957?

The Witness: Do I know?

Hearing Examiner Buttle: Yes.

The Witness: No, I couldn't possibly remember what my total business was in 1957.

Hearing Examiner Buttle: You don't remember what your total gross sales were?

The Witness: No, not without looking at the records.

Hearing Examiner Buttle: All right.

By Mr. McAleer:

Q. Could you tell me, Mr. Mignogna, what proportion of your sales in 1957 were made to plumbing contractors?

A. I would say at least seventy-five or eighty percent.

Q. Could it be as high as eighty-five?

A. Possibly, yes.

Q. Could it be as high as ninety percent?

A. It could be.

Q. You only sold occasionally to a customer who may have walked in off the street?

A. That is correct.

Q. In selling plumbing fixtures, Mr. Mignogna, to 1050 plumbers, did you usually sell the fixtures in three-piece sets in 1957?

A. Yes, if that is what they wanted.

Q. Would you say a substantial proportion of your sales of plumbing fixtures in 1957 were in three-piece sets?

Hearing Examiner Buttle: Now counsel for the Commission didn't go into this.

Mr. McAleer: I know he didn't, sir, but he did go into the question of whom he sold to.

Mr. Depro: I am objecting, Mr. Examiner.

Hearing Examiner Buttle: Sustained.

By Mr. McAleer:

Q. Mr. Mignogna, in order to be an adequate plumbing supply house and do a good job as a wholesaler of plumbing

fixtures, is it necessary for you to carry various sizes of plumbing fixtures?

A. Yes.

Q. In order for you to be a good wholesaler, must you carry the various size tubs?

Mr. Lipnick: I object to this, if the Examiner please. I think this is getting beyond the scope of the direct examination.

Hearing Examiner Buttle: Sustained.

By Mr. McAleer:

Q. Could you tell me, Mr. Mignogna, what proportion of your total tub sales in 1957 were in 5-foot recess tubs?

1051 Mr. Lipnick: Objection. I don't think there was any breakdown of proportion of sales of which products. He is getting at the proposition through a series of indirect questions what you sustained the objection to.

Hearing Examiner Buttle: Sustained.

By Mr. McAleer:

Q. Mr. Mignogna, you testified you maintained a display of plumbing fixtures at your store; is that correct?

A. Yes.

Q. Did you maintain a display in both stores?

A. Yes.

Q. In 1957 did you have on display a 4 and ½ foot bath tub?

Mr. Lipnick: Objection.

Mr. McAleer: Now, your Honor, I think I am entitled to find out what was in the display he maintained in the store in 1957.

Hearing Examiner Buttle: Yes, I suppose so. All right.

The Witness: Do you want me to answer that?

Hearing Examiner Buttle: Yes.

The Witness: Did I have a 4 and ½ foot tub on display?

Mr. McAleer: Yes.

The Witness: No.

1052 By Mr. McAleer:

Q. Did you have a 5-foot recess tub on display?

A. Yes.

Q. Could that 5-foot recess tub be a 16-inch high tub sold by Universal-Rundle?

Hearing Examiner Buttle: What?

Mr. McAleer: 5-foot, 16-inch high recess tub.

Hearing Examiner Buttle: I will allow it.

The Witness: Yes.

By Mr. McAleer:

Q. Did you maintain and display a corner tub in 1957?

A. I think so.

Q. You are not certain, however, that you did maintain a corner tub on display in 1957?

A. I know I had a grey tub, corner tub, on display and whether or not that grey corner tub came out in '57 or not—If they came out with a grey color in '57 then I had it on display.

Q. What other manufacturers' fixtures in 1957 did you sell, Mr. Mignogna?

Hearing Examiner Buttle: Other manufacturers?

Mr. McAleer: Yes, sir. On direct examination they asked him whether or not he sold any other fixtures other than Universal-Rundle and he stated yes.

Hearing Examiner Buttle: Well, does that establish anything?

Mr. McAleer: I think it will, sir.

1053 Hearing Examiner Buttle: No, I mean does the interrogation by Commission's counsel establish anything?

Mr. McAleer: I think we are entitled to know, Mr. Buttle.

Hearing Examiner Buttle: No, but what am I supposed to do with the fact they have fixtures on display? Suppose that is so, yes, they have fixtures on display? That has established nothing.

Mr. McAleer: My question now, sir, is not directed toward the display of fixtures.

Hearing Examiner Buttle: Yes?

Mr. McAleer: I am asking him what fixtures other than Universal-Rundle he sold in 1957.

Hearing Examiner Buttle: All right I will allow it, but make it short. We are wasting time.

The Witness: I could have sold almost anything in '57 other than Universal-Rundle. I might have sold Kohler, American Standard or Richmond Radiator. Whatever my customers wanted I would get for them.

By Mr. McAleer:

Q. You testified on direct examination that price was one of the important factors in selling plumbing fixtures. What other factors are important other than price?

A. I don't know.

Q. I beg your pardon.

A. I don't know.

1054 Q. Price is the only factor that is of any importance in selling plumbing fixtures?

A. Well, sometimes you would get someone that didn't like a product. That could be a factor also.

Q. Could you tell me, Mr. Mignogna, any plumbing contractor who purchased from you in 1957 who may have gone to another plumbing wholesaler and purchased fixtures?

A. I don't remember.

Q. You don't know of any plumbing contractor who purchased from you in '57 that switched to another wholesaler, do you?

A. I don't know.

Q. Did you purchase plumbing fixtures from Universal-Rundle in truckload quantities in 1957, Mr. Mignogna?

A. I believe we did.

Q. Did you make it a practice to purchase the fixtures in truckload quantities?

A. Yes, when our inventory started running low we would order a truckload.

Q. The occasional sales that you may have made to a customer who walked in off the street you did not arrange for installation of the fixtures, did you, Mr. Mignogna?

A. No.

Q. In selling fixtures to consumers, Mr. Mignogna, did the price of the fixture include the price of trim that may be on it?

1055 A. Yes.

Mr. McAleer: I have no further questions.

Hearing Examiner Buttle: All right. Is there any redirect?

Redirect Examination by Mr. Depro.

Q. Mr. Mignogna, you were asked whether or not there was any plumbing contractor buying from you in '57 who had switched to another wholesaler. Could that have been possible and you wouldn't have known about it, or you don't recall?

A. I don't recall.

Hearing Examiner Buttle: How did you know they went to another wholesaler?

The Witness: How would I know?

Hearing Examiner Buttle: I am asking you, do you or don't you?

The Witness: I don't know.

By Mr. Depro:

Q. Is it customary among the plumbing contractors to shop around for prices; do you know?

A. Yes.

Q. Do you know whether anyone, any plumbing contractor switched to you from some other wholesaler in 1957?

A. No, I don't.

Q. You do not?

1056 A. No.

Q. Did you arrange for the installation of any plumbing fixtures that you sold?

A. No.

Hearing Examiner Buttle: Is that all?

Mr. Lipnick: No, sir.

By Mr. Depro:

Q. Mr. Mignogna, could you state what, with a degree of certainty, reasonable certainty, what the percentage of your total sales of plumbing supplies, plumbing fixtures were to plumbing contractors for 1957?

A. Like I said before, I guess it would be about seventy-five or eighty percent.

Hearing Examiner Buttle: Yes, and he said it might even be ninety percent.

Mr. Depro: Yes, I was just trying to get that down—

Hearing Examiner Buttle: He testified to that.

By Mr. Depro:

Q. Mr. Mignogna, I ask you to look at Commission's Exhibit 84-Z-19, which is a copy of an invoice from Universal-Rundle to Central Supply, and I ask you to look at the first item listed there to see if that refreshes your recollection as to whether you stocked a 5-foot corner tub in 1957?

Mr. McAleer: Your Honor, we didn't ask him whether he stocked a tub.

1057 Mr. Depro: Displayed. I will change that to displayed.

Hearing Examiner Buttle: What is your answer?

The Witness: I believe this is the one that I had on the floor for display (indicating).

By Mr. Depro:

Q. Your answer is that it does refresh your recollection and that you did have a corner tub, a 5-foot corner tub on display in 1957?

A. Yes.

Mr. Depro: That is all, Mr. Examiner.

Hearing Examiner Buttle: All right. Have you any recross?

The Witness: Excuse me a minute. May I look at that again? Yes, this is the one I had on display.

Hearing Examiner Buttle: All right.

Recross-Examination by Mr. McAleer.

Q. Mr. Mignogna, have you been interviewed by a representative of the Federal Trade Commission excluding the past few days?

Mr. Lipnick: I object to this line of questioning, Mr. Examiner. This line of questioning was gone into with one witness previously and there was nothing improper
1058 shown by the line of questioning; and unless Mr. McAleer can make some offer of proof I don't think the implication of this kind of question should be permitted in this hearing.

Hearing Examiner Buttle: Well, it is always permissible on cross-examination.

Mr. Lipnick: Sir, this is recross examination. This is not cross examination.

Mr. McAleer: Mr. Lipnick has drawn the implications, Mr. Buttle. I have not attempted to characterize it one way or another.

Hearing Examiner Buttle: All right, I will allow it, but

I am not going to allow extensive examination unless it is directly related to the direct insofar as this witness is concerned.

I said I will allow it.

By Mr. McAleer:

Q. When were you first interviewed by an investigator? from the Federal Trade Commission?

A. It must have been a couple of years ago.

Q. Have you been interviewed by an investigator or anyone else from the Federal Trade Commission since June of this year?

A. Since June of this year?

Q. Yes, sir.

A. No, not until I came into the courtroom today.

1059 Q. Mr. Mignogna, did you ever receive a display allowance from Universal-Rundle for fixtures that might be displayed in stores?

Mr. Lipnick: I object.

Hearing Examiner Buttle: Sustained.

Mr. McAleer: May I point out, Mr. Buttle, that Mr. Depro on redirect—

Hearing Examiner Buttle: Did you ask him whether he received a discount?

Mr. Lipnick: No, sir, he was asked on cross examination by Respondent's counsel whether or not he purchased in truckload lots. No one asked him whether or not he received a discount.

Hearing Examiner Buttle: Yes, sustained.

Mr. Fruchterman: If your Honor please—

Hearing Examiner Buttle: Sustained; sustained.

Mr. McAleer: I have no further questions, Mr. Buttle.

Hearing Examiner Buttle: All right. The witness is excused. Thank you very much.

* * * * *

1061 CHARLES FRIEDMAN was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Hearing Examiner Buttle: Give your name and address to the Reporter, please.

The Witness: My home address, sir?

Hearing Examiner Buttle: Yes.

The Witness: Charles Friedman, 1013 Chandler Street, Philadelphia 11.

Hearing Examiner Buttle: Proceed.

1062 *Direct Examination by Mr. Lipnick.*

Q. Mr. Friedman, what is your business address, please?

A. 2850 Richmond Street, Philadelphia 34.

Q. What business is located at that address, sir?

A. Plumbing and Heating Supplies, Wholesale.

Q. What is the name of that business?

A. Nat Friedman's Sons.

Q. Is that a corporation or a partnership?

A. That is a partnership.

Q. Who are the partners?

A. My mother, Anna, my brother Aaron, and myself.

Q. Did you say that that was a wholesale business dealing in plumbing and heating supplies?

A. Yes, I did.

Q. In 1957, sir, did your business purchase and resell plumbing fixtures?

A. Yes, we did.

Q. From which manufacturers did you purchase plumbing fixtures in 1957, sir?

A. I believe that the majority of our purchases in 1957 were from Universal-Rundle.

Q. Did you purchase from any other manufacturers?

A. Direct?

Q. Yes.

1063 A. Some of Richmond plumbing. No other.

Q. Are you familiar with the term "projects"?

A. Yes, I am.

Q. What do you understand that term to mean?

A. As far as our business is concerned, a project is operational work, building of a certain amount of homes by one builder in a certain specified area. Would that be what you are referring to?

Q. Well, I wanted to know what you would understand by the term.

A. That's what I understand.

Q. In 1957, in the course of your business, did you make any sales to projects, as you understand them?

A. We did not.

Q. Did you make any sales to apartment house construction in 1957?

A. No.

Q. What about motels?

A. No.

Q. Would you tell us, Mr. Friedman, whether or not you can state with reasonable certainty what your gross volume of sales of Universal-Rundle fixtures was in 1957?

A. Not with any definite certainty, because we do not have complete records. I would say within reason between $25,000 and $30,000 worth.

1064 Q. Was that your sales of Universal-Rundle fixtures, or of all plumbing fixtures?

A. Plumbing fixtures.

Q. What portion of that would be Universal-Rundle?

A. Still this is conjecture, as far as I am concerned.

Q. Well, if you have to conjecture, we might as well not have it, sir.

Hearing Examiner Buttle: You cannot state with reasonable certainty?

The Witness: Not reasonable certainty, sir.

By Mr. Lipnick:

Q. Was Universal-Rundle one of your principal suppliers in 1957?

A. Yes.

Q. In connection with your sale of Universal-Rundle fixtures, would you tell us to what class or classes of customers you sold those fixtures?

A. The DTU, or, in other words, to the homeowners direct were the majority of our sales, as far as Universal-Rundle was concerned.

Q. In connection with that portion of your business, sir, in 1957 did you have occasion to form an opinion as to who your principal competitors were in the sale of plumbing fixtures?

A. Yes.

1065 Q. What was that opinion?

A. We have a few neighborhood competitors who are wholesalers, such as William Betz, Jr., Richmond Plumbing Supply, and we ran into competition with our homeowner from Mars, and from Sears Roebuck.

Q. The first two companies you mentioned, did they also compete as a DTU?

A. Selling DTU's?

Q. Yes. You see, I am asking you about your Universal-Rundle business. As I recall you say that—I do not mean to put words in your mouth, so if I am wrong please correct me—as I recall, you stated that the majority of your Universal-Rundle business was as a DTU to the homeowner.

A. That's right.

Q. Now, in connection with that business you men-

tioned four companies as being your principal Competitors in 1957.

A. Right.

Q. And I was just—were those first two also operating as DTU's?

A. The first two were wholesale houses.

Q. Well, did they compete with you insofar as your sales of plumbing fixtures to homeowners was concerned?

A. Yes.

Q. In the conduct of your business, insofar as it relates to selling Universal-Rundle fixtures, direct to home-
1066 owners, did you find it necessary in 1957 to take certain measures in order to maintain or to increase your sales?

A. I cannot understand that question clearly, sir.

Q. Very well, I will rephrase it.

When prospective customers came into your store, did you talk to them, did you have conversations with them?

A. Yes.

Q. On the basis of those conversations, did you conclude that in order to maintain or to increase your business with these customers, that it would be necessary for you to conduct your business in a certain manner, for you to do certain things?

A. I still could not answer that question.

Q. Very well, I will rephrase it, then.

On the basis of the conversations which you had with these customers, did you form any opinion as to what the principal factors of competition were between your company and the other companies which were selling to similar people in your area?

A. Yes.

Q. What did you believe that those factors were, sir?

A. Merely price.

Q. Were there any other factors which were of significance in your judgment?

A. None whatsoever.

1067 Q. Did you understand the previous questions to relate to the year 1957?

A. Yes.

Q. And for the rest of this examination, will you understand that unless I indicate otherwise, my questions are related to the year 1957.

A. Yes.

Q. This is again with respect to your business as a DTU.

When the homeowners, the prospective homeowners, customers, came into your store, did they indicate any brand consciousness?

A. Rarely.

Q. Did they indicate any preference for one style or design as opposed to another?

A. May I ask a question? Do you mean as far as manufacturer's design or design of a piece of stock?

Mr. McAleer: I suggest, Mr. Buttle, Mr. Lipnick propound the questions and the witness answer the questions.

Hearing Examiner Buttle: Don't ask counsel questions. Just so you don't understand.

The Witness: Thank you.

By Mr. Lipnick:

Q. Well, as far as the styling of the plumbing fixtures which were offered for sale in 1957 were concerned, was each line styled differently from each other line?

1068 A. Not too much.

Q. In 1957, sir, did any people in your store state that they had been shopping at Sears for plumbing fixtures?

A. Yes.

Q. Did they compare your prices with Sears prices?

A. Yes.

Q. In 1957, Mr. Friedman, did you maintain any type of display of Universal-Rundle fixtures?

A. Yes.

Q. What was the nature of that display?

A. In one window we had a water closet and a lavatory.

Q. Mr. Friedman, in 1957 did you take advantage of cash discounts which were offered by any of your suppliers?

A. The only discount we took advantage of was the two per cent on the tenth. If we paid the tenth of the following month, the bills of the previous month we were entitled to a two per cent discount. We were unable to take advantage of any volume buying discounts.

Mr. Mc Aleer: I move to strike the remainder of the answer to the question. All he was asked about was cash discounts.

Hearing Examiner Buttle: It is not responsive. Strike it. But you may make inquiry about it, Mr. Lipnick.

By Mr. Lipnick:

Q. Did you take advantage of two per cent cash 1069 counts from Universal-Rundle?

A. Yes.

Q. Was that a general policy of your business, to do so?

A. Always, with every account.

Q. Why did you do that?

A. Pardon?

Q. Why did you do it?

A. Take advantage of the discount?

Q. Yes.

A. It entered into our profit policy. We needed that two per cent.

Q. Did you ever buy plumbing fixtures in truckloads?

A. We did not.

Q. Why not?

A. Lack of space and lack of money.

Mr. Lipnick: No further questions.

Hearing Examine Buttle: All right. Cross-examination?

Cross-Examination by Mr. Fruchterman.

Q. When you testified that you did $30,000 worth of plumbing fixture business in 1957, what did you mean by the word "fixture"?

A. Fixtures—that was plural, sir.

Q. Fixtures.

1070 A. That would be bathtubs, water closets, lavatories.

Hearing Examiner Buttle: Off the record.

(Discussion off the record.)

Hearing Examiner Buttle: Back on the record.

Did you finish your answer?

The Witness: No, sir.

Hearing Examiner Buttle: Would you finish it, please?

The Witness: Bathtubs—also sinks, cabinets, and brass bibs, to supplement the plumbing supplies.

By Mr. Fruchterman:

Q. Do you include pipe in there?

A. No.

Q. Do you include fittings in there?

A. No.

Q. Now, do you distinguish, in using the word "fitting" between such articles as unions and T's and elbows, and such articles as faucets and chrome covered wastes and things like that?

A. Yes.

Q. Do you classify faucets and shower heads as trim?

A. As part of the fixtures.

Q. I see. So your answer of $30,000 included such things as showerheads, tub fillers, faucets, handles.

A. Diverters.

1071 Q. Well, if you stripped the last class of articles, the chrome equipment which you sell, and just consider fixtures, the cast iron pieces themselves, and the vitreous china pieces themselves, could you tell us what you estimate your purchases of fixtures in that sense were in the year 1957?

A. It would be very difficult for me to break that down, sir.

Q. Now, when you testified the majority of your sales of Universal-Rundle equipment were in the DTU end of your business, isn't it a fact that you are referring to such articles as faucets, showerheads and the like, as opposed to the cast iron and vitreous china fixtures?

A. No, sir.

Q. Isn't it a fact that the vast bulk of your purposes from Universal-Rundle Corporation during 1957 were in fact articles such as showerheads, aerators, rim fillers, turnlever wastes, hexagon lavatory legs, towel bars, and articles of that type?

A. Not to the best of my knowledge.

Mr. Fruchterman: Mr. Buttle, I invite your attention to Exhibit—Commission Exhibit 89-A thru Z-14, and if you will consider just the cast iron and vitreous china fixtures, you will notice that this company's purchases from Universal-Rundle during the 1957 approximated some $1,200 worth of cast iron and vitreous china fixtures.

1072 Hearing Examiner Buttle: All right. I suppose counsel for the Commission can check that and advise me.

Mr. Lipnick: I would expect, sir, at some point in this case counsel for the Commission will present a tabulation

which will reveal what we contend total purchases of fixtures would be.

Hearing Examiner Buttle: Mr. Fruchterman did it very properly, and it is on the record.

Mr. Fruchterman: I will also invite your attention to the same exhibits, Your Honor, for the purpose of demonstrating that certainly a very sizeable portion of the purchases made by the Friedman Company from Universal-Rundle during 1957 were in fact articles of trim, such as showerheads and diverters and aerators.

Mr. Lipnick: If the Examiner please, as far as this process is concerned, I will not object to it, provided it is done solely for whatever value it may have in terms of—bearing on the credibility of the testimony of this witness. If it's going to be Mr. Fruchterman's position that this man operated a small business he could not be injured by a discrimination against him, I think Mr. Fruchterman ought to know better.

I think if this man bought only one bathtub, or only one lavatory in 1957, he was still entitled to receive price treatment which he is entitled to under the Clayton 1073 Act. It would be, I think—

Hearing Examiner Buttle: I understand your position.

By Mr. Fruchterman:

Q. Mr. Friedman, are you able to estimate the gross sales made by your business during 1957?

A. No, sir.

Q. But you are able to estimate the amount of those gross sales which were in plumbing fixtures, is that correct?

A. Approximately, yes.

Q. Do you also sell heating articles?

A. Yes.

Q. Are you able to estimate the gross amount of sales

your company did in heating during 1957, heating equipment?

Mr. Lipnick: Mr. Examiner, at this point I am going to object to this line of questioning. If it is being offered to prove anything, it is entirely immaterial and irrelevant to this case. Insofar as it might bear on the accuracy of this witness' testimony on direct examination, I think the point has been made, and anything further along those lines would be merely cumulative.

Hearing Examiner Buttle: What about that, Mr. Fruchterman?

Mr. Fruchterman: Well, Your Honor, I think we have a situation here where on direct examination the
1074 inference was raised that this was an important part of his business, that he did a substantial amount of business in this, that he was retailing the articles. We want to get a description of this business as it actually is, as we believe it is, and we think we are entitled to go into that on cross-examination.

Hearing Examiner Buttle: In other words, you want to show the lack of substantiality, since the Commission has apparently endeavored to show the substantiality?

Mr. Fruchterman: Also the type of business. As far as our direct examination is concerned, it would appear that as far as plumbing fixtures are concerned, this man is a mere retailer. We do not think that is the case. We believe we are entitled to go into it on cross-examination.

Hearing Examiner Buttle: All right, go ahead. Objection overruled. As far as credibility, it is difficult for me to see the relevancy of it.

Mr. Lipnick: I might say, sir, I think so far Mr. Fruchterman has used about 18 sledge hammers to kill the same fly.

Hearing Examiner Buttle: There is no such thing as cumulative evidence insofar as cross-examination is con-

cerned, Mr. Lipnick. The only thing is there is a limit to which you can press the witness. But I do not think this witness appears very hard-pressed.

1075 Mr. Fruchterman: I believe I have a pending question.

(The Reporter read the question as follows:

"Question: Are you able to estimate the gross amount of sales your company did in heating during 1957, heating equipment?")

The Witness: I was under the impression that I was to be examined, tested as far as plumbing fixtures. Now, I feel that I am on trial as far as my entire business is concerned. He is probing into the matter of my business. Do I have to answer those questions, sir?

Hearing Examiner Buttle: I think you ought to limit the questions to the plumbing business. That is all this witness has testified about. I see no point in getting into anything else.

Mr. Fruchterman: Well, your Honor, on direct examination a point was raised that the man could not take advantage of any discounts offered other than the cash discount, and that would go to the size of his entire business.

Hearing Examiner Buttle: Well, if it doesn't go to the question of plumbing fixtures, then I am not paying any attention to it.

Mr. Fruchterman: If your Honor please, the answer was, as I recall it, that he did not have space and he did not have the money.

1076 Hearing Examiner Buttle: That's right.

Mr. Fruchterman: Now—

Hearing Examiner Buttle: And that was limited to plumbing fixtures.

Mr. Fruchterman: But if he had space and money enough to inventory heating supplies, would that answer

mean very much? Wouldn't that reflect on the value of that answer?

Hearing Examiner Buttle: Yes, I suppose you are right about that.

Mr. Lipnick: Well, Mr. Examiner, in terms of these truckload discounts that we are dealing with, if the witness cannot take it for whatever reason he believes he cannot take it, what difference does it make? This is, after all, not a 2(d) case. We are not trying to determine whether that discount was in fact available to him. We are trying to determine whether he got it.

Mr. Fruchterman: I would like to remind you, your Honor—

Mr. Lipnick: Mr. Fruchterman, I think, is trying to make a big point out of converting this to a 2(d) case.

Hearing Examiner Buttle: It is no big point to me. But on the other hand, it does have a bearing on the witness' credibility.

Well, it doesn't seem to me that you have to ask 1077 that question in order to interrogate concerning the subject which you have indicated to me you wish to interrogate about. Do you know what your gross sales were?

The Witness: Approximately $50,000.

By Mr. Fruchterman:

Q. That is in heating equipment?

A. That is the question you asked me, sir.

Q. Now, do you maintain an inventory of heating equipment?

A. Yes.

Q. Do you have storage space for that inventory?

A. Yes. But—

Mr. Lipnick: I will object to that question, sir. This is getting a little far afield.

Hearing Examiner Buttle: Yes. Did you?

The Witness: May I answer the question my own way?

Hearing Examiner Buttle: Yes.

The Witness: I have to explain the nature of our warehousing in order to answer that question.

Hearing Examiner Buttle: All right.

The Witness: We are very cramped for space. We do a lot of physical work in my particular business, my organization. We turn over our stock approximately a minimum of ten times a year. That is why we could inventory certain things. If we ordered one item in quantity, we had to make space in the inventory and sacrifice another.

1078 Do I make myself clear?

Hearing Examiner Buttle: I suppose you inventory the items you could move the best?

The Witness: That is what I am driving at, sir.

Hearing Examiner Buttle: All right.

By Mr. Fruchterman:

Q. Isn't it a fact that if you went to inventory fixtures, plumbing fixtures, such as tubs, that you would have to inventory not only the white pieces, but six different colored pieces, too?

A. That's right. We required a tremendous amount of additional space to inventory enamelware than it would heating.

Q. Now, if you wanted to spend the money, you could do that, couldn't you? You could inventory these.

A. I could not answer that question truthfully, sir.

Mr. Lipnick: I object to that.

Hearing Examiner Buttle: Sustained. Of course, if he wanted to spend the money. I suppose he can do anything. I sustain the objection. Ask another question.

By Mr. Fruchterman:

Q. You were aware, were you not, that in 1957 if you had bought in truckloads from Universal-Rundle, as far as fixtures are concerned, you would have received a discount.

Mr. Lipnick: I object, sir. I do not see that it has any bearing whatsoever on this case, whether he was aware
1079 of it or not.

Hearing Examiner Buttle: Were you aware of it?

The Witness: Yes.

Hearing Examiner Buttle: He has explained it, Mr. Fruchterman. He did not have the space he wanted to use for maintaining an inventory—despite the fact that he knew he could get the discount.

Mr. Fruchterman: All right.

By Mr. Fruchterman:

Q. Now, when these customers that you put in the DTU category, homeowners, would come in buy from your store, do they take the merchandise with them, is it an over-the-counter sale?

A. Normally, no, because of the heaviness of your bathtubs. If we sold a complete bathroom outfit, we would deliver it.

Q. I see.

A. Smaller pieces were over-the-counter.

Q. When you ordered from Universal-Rundle, did you order in response to requests made by your trade customers for merchandise which you did not have in inventory?

A. Will you please explain what you mean by trade customers?

Q. As far as your trade customers.

A. What do you mean by trade customers.

Q. Your plumbers.

Hearing Examiner Buttle: Don't ask the counsel 1080 questions. Just say you do not understand.

The Witness: I do not understand the question.

By Mr. Fruchterman:

Q. I will rephrase the question.

Do you refer to your plumber customers as your trade customers?

A. Yes.

Q. Now, when you call orders in or back in 1957 when you called orders in to Universal-Rundle over in Camden, would you do that in response to an order already placed by you—already placed with you by one of these plumbers?

A. No.

Q. Who are Bofinger Brothers?

A. Plumbers.

Q. Are they customers of yours?

A. Yes.

Q. Were they customers of yours in 1957?

A. Yes.

Q. I call your attention to Commission's Exhibits 89-Z-12 and 89-Z-13.

Now, from those documents are you able to tell whether or not when they are ordering from you in that instance, whether you had already sold the merchandise?

A. No, I cannot.

Q. Bofinger Brothers are in the plumbing business, 1081 not the hauling business, aren't they?

A. They are plumbing contractors, sir.

Mr. Fruchterman: I invite your attention, Mr. Buttle, to the two exhibits, 89-Z-12 and 89-Z-13, and in particular to the notation "Bofinger Brothers will call".

By Mr. Fruchterman:

Q. Mr. Friedman, did you at any time during the year 1957 advertise plumbing fixtures?

A. No.

Q. Mr. Friedman, could you describe just briefly the inside of your store, what a customer would see as he came in?

A. He would come into a store that had two window fronts and a doorway center. The entire front is 24 feet wide. He would come in and all he would see would be counter and bins.

Q. Now, bins—do you mean the type of shelves that are used in plumbing supply houses to hold fittings?

A. That's true.

Q. Such things as nipples and valves?

A. And fittings, yes, sir?

Q. Once inside the store, would a customer be apt to see a bathtub on display?

A. I am not reasonably sure of the year 1957. There was a time when—

Mr. Lipnick: I object. If Your Honor please, if the witness can answer with reasonable certainty as to
1082 1957, that's fine. But if we go beyond that, it is immaterial.

Mr. Fruchterman: I will accept the answer.

Hearing Examiner Buttle: In other words, you cannot say with reasonable certainty if that was so in 1957.

The Witness: True, sir.

1083 By Mr. Fruchterman:

Q. Isn't it a fact, Mr. Friedman, that your over-the counter DTU sales were a mere incident of your business as a plumbing jobber?

Mr. Lipnick: I object. That is argumentative, sir.

Mr. Fruchterman: That is the point of cross-examination.

Hearing Examiner Buttle: I will allow it.

Objection overruled.

The Witness: Would you repeat the question, please.

By Mr. Fruchterman:

Q. Isn't it a fact that your sales as a DTU are merely incidental to your business as a plumbing jobber?

A. I cannot answer that truthfully, because I cannot understand the concept of that.

Q. As a plumbing jobber, the term "plumbing jobber" as used in the industry generally refers to a merchant who fulfills the needs of plumbing contractors, is that not so?

A. That is right.

Q. And isn't that your primary business?

A. That is our aim, yes.

Q. And isn't your DTU business merely an incident of it?

A. A very nice incident.

1084 Q. But it is not something that you strive to do, is it?

A. Yes.

Q. If you were striving for DTU business, wouldn't you advertise?

A. We are not permitted—as a wholesale jobber, we are not permitted to advertise.

Q. Who forbids you to advertise?

A. I don't know whether it is an unwritten law. We can put an advertisement, if you would call it such, in, say, a plumbers' association ad book. But we cannot advertise in newspapers, because we are listed as a wholesale jobber.

Q. Well, the fact is that registered plumbers simply would not buy from a DTU, isn't that the fact? If you want that business, you cannot make yourself a DTU.

Mr. Lipnick: I object.

The Witness: We are not DTUs. We are wholesale jobbers, recognized by acknowledged manufacturers. If we were DTUs, the reputable manufacturers whom we deal with would not sell us.

By Mr. Fruchterman:

Q. And as a matter of fact, your registered plumbers would resist buying from you, would they not?

A. If we were DTUs, would Universal-Rundel have sold to us? I beg your pardon. That is a question.

Mr. Fruchterman: I think, sir—

1085 Hearing Examiner Buttle: The witness has explained it. He said they are wholesale jobbers and at times they sell direct to the customer. And you keep pressing to have the witness say again and again the same thing. He has said it I don't know how many times, both on direct and also on cross.

Mr. Fruchterman: Well, Your Honor, as I recall he said on direct the majority of his plumbing fixture sales were to home owners.

Mr. Lipnick: If Your Honor please, I think that Mr. Fruchterman is somewhat in error as to what he said on direct examination. He said that the majority of his sales of Universal-Rundel products were made as a DTU.

Hearing Examiner Buttle: That is right.

Mr. Fruchterman: And he was not certain he bought any fixtures from anybody else in 1957.

The Witness: I did not say that, sir.

Hearing Examiner Buttle: Well, is it a fact that all of your sales of Universal-Rundel products are DTUs? Is that your testimony?

The Witness: Yes, it was.

Hearing Examiner Buttle: And you do not wish to change it.

The Witness: I do.

Hearing Examiner Buttle: All right.

1086 The Witness: May I?

Hearing Examiner Buttle: Yes.

The Witness: In regards to Bofinger Brothers, Mr. Fruchterman is so positive that he ordered it specifically

from us. There is always the chance, knowing the Bofingers, as I do, that they called me and asked me what I could give them in a hurry, and I told them that, because I know Mr. Bofinger for years, and he has used the greatest majority of American Standard products—and it makes me believe, not knowing definitely, because it is five years ago, that he asked me what I could supply him with on the spur of the moment, as quickly as possible. And Universal-Rundel was very accessible to our business, just over the bridge and back again. That is why I serviced Bofinger Brothers with Universal-Rundel.

Hearing Examiner Buttle: You say that was the exception to the rule?

The Witness: That is the exception. I can add also that my plumbers, my registered and master plumbers, would not buy Universal-Rundel from me, because they felt they were dealing with a competitor.

Hearing Examiner Buttle: All right. Go ahead.

By Mr. Fruchterman:

Q. When you sell plumbing fixtures to persons other than registered plumbers, do you protect the plumber?

1087 A. Yes, we do.

Q. When customers other than registered plumbers come into your store, they realize that they are purchasing a durable item, do they not?

Mr. Lipnick: I object. I think that is speculative.

Hearing Examiner Buttle: Yes. Sustained.

By Mr. Fruchterman:

Q. How long, in your opinion, Mr. Friedman, does the average piece of plumbing fixture last?

A. I cannot answer that question, sir.

Q. It is a period of years, though, is it not?

A. Yes, I imagine.

Mr. Lipnick: Motion to strike.

Hearing Examiner Buttle: Yes. Strike it.

Mr. Fruchterman: Your Honor, if I might approach the bench, I will explain—

Hearing Examiner Buttle: What good does it do you? He cannot answer the question.

Mr. Fruchterman: Well, he answered sufficient for the purpose.

Hearing Examiner Buttle: He answered it with a great deal of conjecture.

By Mr. Fruchterman:

Q. Isn't it a fact that the average consumer would purchase plumbing fixtures only once or twice in his lifetime?

Mr. Lipnick: I object. There is no showing that 1088 this man is qualified to be an expert on marketing, to tell us what the average consumer purchases in his lifetime.

Hearing Examiner Buttle: Yes.

Mr. Mc Aleer: I think we can point out that this man has held himself out as one selling primarily as a DTU and selling to customers. He certainly knows how often the customers come back into his store again and buying a plumbing fixture. He has held himself out as a man selling direct to consumers. He is dealing with consumers every day, according to his testimony.

Mr. Lipnick: Well, I think that is a rather exaggerated characterization of his testimony, if the Examiner please.

Hearing Examiner Buttle: All right. You may ask him.

Mr. Lipnick: Mr. Examiner, may I be heard on that point. Iwould just like to say that the way that question is phrased, the only person who could possibly come up with an answer with any reasonable certainty in their own mind would be an expert on mass marketing who had made a large and elaborate survey.

Hearing Examiner Buttle: He is entitled to ask the witness if he knows. This is cross-examination. He is not trying to establish anything through expertness.

1089 However, to ask him whether or not a customer comes back to him—I don't know what that would prove—how often they come back to him—whether the answer was yes or no.

Mr. Fruchterman: Your Honor, I think—

Hearing Examiner Buttle: Do you have the same customers to whom you sell directly coming back to you? Do they purchase—

The Witness: A bathroom outfit?

Hearing Examiner Buttle: Did you have occasion to have one of them buy new equipment from you, having bought equipment from you previously?

The Witness: Yes. And I can clarify that, sir, because we say DTU business—it does not necessarily mean the home owners themselves. In the trade there is a man known as a moon-lighter. Do you know the phrase, sir?

Hearing Examiner Buttle: Will you explain what that is.

The Witness: A moon-lighter is a man who is a plumber, plumber's helper, or even a shoe salesman, who does work in the evening—thus the term "moon-lighter"—for himself. These people often bought bath tubs for the home owner and installed them. So I cannot say that I sold six to one person as a home owner or as a moon-lighter.

Do I make myself clear?

Hearing Examiner Buttle: Do they get the whole-

1090 sale price or do they get the regular retail price?

The Witness: They got an in-between price.

Hearing Examiner Buttle: Besides, just because a customer comes back again could mean nothing. Possibly he is building another bathroom. I don't know what that could mean.

Mr. Lipnick: If Mr. Mc Aleer and Mr. Fruchterman would like to have a brief conference off the record, we might be able to work out a concession on whatever point they are trying to prove.

Hearing Examiner Buttle: Let's complete this.

By Mr. Fruchterman:

Q. Mr. Friedman, was it your testimony that customers rarely expressed themselves on matters of style?

A. I do not remember my answer.

Mr. Fruchterman: No more questions, Your Honor.

Hearing Examiner Buttle: Any redirect?

Redirect Examination by Mr. Lipnick.

Q. Mr. Friedman, what does the term "protect the plumber" mean?

A. Give him the proper wholesale price in regards to a DTU's price. In this way, by doing this, we—the registered plumber would bear less resentment when he knew he was protected this way.

1091 Q. Mr. Friedman, as I recall, you stated on cross-examination that your trade customers would not purchase Universal-Rundle products from you because they felt they would be dealing with a competitor.

A. That is right.

Q. Which competitor was that?

A. Sears Roebuck.

Q. Can you state with reasonable certainty, sir, whether among the trade with whom you dealt it was common knowledge that Sears Roebuck was connected with Universal-Rundle?

A. It was common knowledge.

Q. Was it common knowledge that Universal-Rundle manufactured the Homart line of plumbing fixtures?

A. It was.

Hearing Examiner Buttle: You mean it was common knowledge in the trade?

The Witness: In the trade, sir.

By Mr. Lipnick:

Q. Now, these moon-lighters that you mentioned—did your moon-lighter customers buy Universal-Rundle products?

A. They asked for no definite products.

Q. Well, when you stated that most of your sales of Universal-Rundle products were made as a DTU, as opposed to as a wholesaler, I now understand that there is a third class coming in here, and that is the moon-lighter.

1092 I am just trying to find out where they came in, as far as your sales of Universal-Rundle products were concerned.

A. We sold the moon-lighter Universal-Rundle for the same reason we sold the DTU, because of the convenience of the Universal-Rundle plant.

Hearing Examiner Buttle: They could buy where they could pick them up immediately.

By Mr. Lipnick:

Q. When you stated that the majority of your Universal-Rundle sales were made as a DTU, did that majority include the sales which you made to moon-lighters?

A. Yes.

1095 ALBERT A. BLACKMAN was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Hearing Examiner Buttle: Give your name and address to the Reporter, please.

The Witness: My name is Albert A. Blackman. I live at 400 Foster Drive; Springfield, Delaware County, Pennsylvania.

Direct Examination by Mr. Depro.

Q. What is your occupation, Mr. Blackman?

A. I am president and sales manager of the Black & Brown, Incorporated, corporation.

Q. What is the name of the company?

A. Black and Brown.

1096 Is that a Pennsylvania Corporation?

A. Yes, sir.

Q. When was it incorporated?

A. 1946.

Q. Where is it located?

A. 2912 Kensington Avenue, Philadelphia.

Q. Do you have a warehouse and showroom at that location?

A. At that location, we have the showroom and offices and limited warehouse.

Q. Do you have any other locations?

A. We have an outside warehouse on Lehigh Avenue that we inventory some other items, major items.

Q. Is that also in Philadelphia?

A. That is in Philadelphia.

Q. Now, what is the business? Will you describe the business of Black and Brown Company?

A. We sell plumbing and heating supplies, kitchen

cabinets, and appliances to the builder trade, plumbers, heating men, apartment houses and accounts of that nature.

Q. And is your answer applicable to the year 1957?

A. Yes.

Q. Was that the same type of customers?

A. Yes, sir.

* * * * * * *

1098 Hearing Examiner Buttle: Aside from those you have mentioned specifically, do you sell to any other category or type of customers?

The Witness: There would probably be other types, other people that are sold. But those that I mentioned are the majority.

Hearing Examiner Buttle: That is your essential business.

The Witness: Yes.

By Mr. Depro:

Q. What other types were you referring to?

Mr. McAleer: Your Honor,—if your Honor please, sir—

Hearing Examiner Buttle: Well, he has not limited himself now. He has indicated that there are other types of customers categorically, and he has indicated that essentially he has named those with whom he does most of his business, but there are some others. So I will allow him to make a complete answer with regard to any others that he may do business with, even if it is minimal business.

The Witness: Right. There would be other types of people that come into the place, people that may
1099 be building houses on occasion—we would sell some of their products that we sell. We sell such a diversified line, you see, in the plumbing and heating and cabinets and so forth.

Q. But I am referring to the plumbing fixtures now. What other types?

Hearing Examiner Buttle: Do you sell to the consumer?

The Witness: There would be some consumers, there would be some.

By Mr. Depro:

Q. And would that have been so in 1957?

A. I would say so.

Hearing Examiner Buttle: But you would say your sales to the consumer were minimal. Is that what your statement is?

The Witness: Yes, sir.

By Mr. Depro:

Q. Now, from whom did you purchase plumbing equipment, plumbing fixtures in 1957?

A. In '57, I would say the majority was Universal-Rundle. We would have bought some other fixtures from other supply houses, as the occasion arises.

Q. And could you tell us what different kinds of 1100 products you purchased from Universal-Rundle in 1957 were?

A. Your plumbing fixtures, your bathtubs, your toilets, your basins—I don't know whether we bought any sinks from them that year or not.

Q. Did you handle any other plumbing equipment from Universal-Rundle—any equipment other than Universal-Rundle in 1957?

A. We would have sold some Richmond fixtures. We would have picked up some other fixtures from other supply houses in Philadelphia—American Standard, Kohler, and so forth.

Q. If someone asked you for those other brands, you would obtain them for them, would you?

A. Yes, sir.

Q. Now, could you tell us or name some of the competitors of yours in 1957 in the plumbing fixture field?

Mr. McAleer: Objection.

Hearing Examiner Buttle: Sustained.

By Mr. Depro:

Q. Would you name some of the plumbing fixture supply houses in the same area—in the same market in which you sold in 1957?

A. Many of your plumbing supply houses in Philadelphia in the surrounding area would be in that category. I could name a number of them. I could not truthfully say that they were our specific competitors in certain cases.

1101 Q. Well, will you name some of the plumbing supply houses in the area in which you did business?

A. I would say people like Fisher Brothers, Weinstein, Hajoca. Of course, coming out of town in Pennsylvania there are other local houses that sell a similar type of accounts that we would.

Hearing Examiner Buttle: Do they seek business of the same customers which you seek business of?

The Witness: Many of those types of outlets would.

Hearing Examiner Buttle: Did they do so in 1957?

The Witness: I would say so.

Hearing Examiner Buttle: How far are they located from where you are located?

The Witness: Well, we are located in the Kensington area in Philadelphia, but we cover—we sell mostly out of Philadelphia in the surrounding counties—in Montgomery County, in Bucks County, in Delaware County and so forth.

Hearing Examiner Buttle: Well, what would you say is the radius of the area?

The Witness: Oh, roughly about a 30, 40-mile radius.

Hearing Examiner Buttle: In all directions?

The Witness: No, over little over in Jersey. Some in Jersey. Mostly in the Pennsylvania radius.

By Mr. Depro:

1102 Q. Mr. Blackman, how long have you been in the plumbing fixture business?

A. Since 1946.

Q. Since 1946?

A. Yes.

Q. Well, during that time, on the basis of your experience in this field, could you tell us in your opinion who your principal competitors were?

Mr. McAleer: Objection, your Honor.

Hearing Examiner Buttle: Sustained.

Who sold to the same customers you sold to, if you know?

The Witness: Those names that I mentioned, those supply houses. We may be in a little different position—I can clarify that—than some of these supply houses, in that when we sell to the builders, we try to sell them everything that we carry, such as plumbing, heating, kitchen cabinets, and a complete line. Now, they do not all handle the same number of lines that we handle.

Hearing Examiner Buttle: Well, what ones, if you know, are seeking the same business in the same market area that you are seeking it, as you have described the market area?

The Witness: Well, these and other supply houses that I mentioned—there must be others, of course. When
1103 we get out of town, we could run, in Delaware County, say, into Conrad Muhly Company.

Hearing Examiner Buttle: Yes. But the question is directed as to who—do you know who they are—who are they?

The Witness: Well, this Conrad Muhly, for instance, that I mentioned in Delaware County, he would be a direct competitor.

Hearing Examiner Buttle: All right. Are there any others?

The Witness: Well, in the Norristown area, it could be, I believe, General Plumbing Supply up there. It is hard to mention others directly.

By Mr. Depro:

Q. Are you familiar with Norristown Supply?

A. I have heard of them.

Q. Would they be in the same category, do you know?

A. I do not know whether they were in business in1957, to give you a truthful answer, I know of their name today.

Q. Did any of your customers or prospective customers indicate to you that they were contacting or contacted by competitors of yours?

A. Well, there is always conversation on that score. Quite often the name of the competitor might not be mentioned.

Q. What was the usual subject that was mentioned 1104 in such situations? Could you tell us? I'm speaking of 1957 now—if you can recall.

Mr. Fruchterman: Objection, your Honor. That would be hearsay.

Mr. Depro: Well, this is in connection with his sales, the sales of his plumbing fixtures, Mr. Examiner. And I believe that he is entitled to relate, not for the truth of what these customers—

Hearing Examiner Buttle: It is hearsay. I will allow it to the extent that it reflects what this witness acted upon or said or did. But otherwise. I cannot allow it, because it is hearsay. And I cannot receive it for the truth of what might have been told him.

Mr. Depro: Yes, sir.

By Mr. Depro:

Q. Do you recall the question?

Hearing Examiner Buttle: Have you heard the name of a competitor mentioned—would you make an effort to seek the business that he was getting, or attempting to get?

The Witness: Yes. If we were covering an account—we would naturally try to get his business in the light of the competition, regardless of who the competition is. Again, it depends on what items we were selling that particular account.

Hearing Examiner Buttle: If you knew someone 1105 who wanted to buy equipment in the area in which you did business, would you seek the business out, if they were negotiating with someone else?

The Witness: That we would.

Hearing Examiner Buttle: And you found out about it and—

The Witness: In many cases, you may not know who they are negotiating with, or if they are.

Hearing Examiner Buttle: Well, did they ever tell you?

The Witness: There must have been cases.

Hearing Examiner Buttle: Not there must have been—did they or didn't they, or don't you recall?

The Witness: It would be hard to give you a straight, truthful answer on that, frankly, because I just could not pinpoint any specific incident or case.

Hearing Examiner Buttle: Did anyone ever tell you that they could obtain a better price from any of your competitors in 1957?

The Witness: That could be.

Hearing Examiner Buttle: Well, forget about whether is could be. Do you recall any instance of that kind specifically?

The Witness: Not specifically, not specifically.

Hearing Examiner Buttle: Well, do you recall it
1106 at all?

The Witness: It seems to be characteristic of our business that you always are in competition, of course, on prices and from other situations. You may not always hear your competitor's name. But your customer may tell you "well, you are so and so much higher than your competition" or you don't get the order and you don't know why you didn't get the order.

Hearing Examiner Buttle: Well, don't they ever mention names when they are trying to get a good price, or do they just say they can get a better price elsewhere?

The Witness: I would say that would be the most likely case.

Hearing Examiner Buttle: You cannot recall any instance in which they said they could get a better price anywhere else in the area that you do business, is that it?

The Witness: Not by name. I would say that would be right.

By Mr. Depro:

Q. Mr. Blackman, do you know any of the other plumbing supply houses in your marketing area who sell—who in 1957 sold the Universal-Rundle line? Did the Girard Supply sell the—

Mr. McAleer: I object, sir.

Mr. Depro: I am just trying to refresh him. If
1107 it is true, I just wanted to know it—I did not want to mislead him.

Hearing Examiner Buttle: The objection is sustained. That is a leading question.

By Mr. Depro:

Q. Can you recall any others, Mr. Blackman?

A. Any other supply houses that would be—that would have sold—

Q. Were selling the Universal-Rundle line in 1957, in the same marketing area where you would sell?

A. I could not specifically name any—I knew that Girard handled it. I could not specifically name any other supply houses that carried Rundle exclusively.

Q. I did not say exclusively.

A. I know that others handle it.

Hearing Examiner Buttle: Well, who handled it, if you know?

The Witness: Well, now, I associate Pescoe in Philadelphia as handling Universal-Rundle. But I am not sure that they handled it in 1957. I mean that I can answer specifically.

By Mr. Depro:

Q. Was Pescoe—was Pescoe Plumbing Supply House?

A. Yes, sir.

Hearing Examiner Buttle: Aside from plumbing
1108 supply houses, do you know of anyone else who handled that line?

The Witness: Well, we know that Sears, Roebuck sells the Universal-Rundle line. We know of other houses, what we call retail houses, or DTU's that handle it. I believe the Mort Company handled it—at Fourth and Girard—they have since gone out of business. I believe Central Plumbing Supply handle it. That is about the names that come to my mind.

Mr. Depro: Did Sears—

Hearing Examiner Buttle: Did you seek retail customers?

The Witness: No, sir.

Hearing Examiner Buttle: You did not seek retail customers?

The Witness: I did not seek them.

* * * * *

1109 Q. Now, Mr. Blackman, did your company have a policy with respect to the payment of bills in order to obtain cash discounts?

A. Yes, sir. We'd like to pay our bills as quickly as possible.

Q. Did you have such a policy in 1957?

A. Yes, sir.

Q. Did you receive a cash discount on the payment of your bills to Universal-Rundle?

A. Yes, sir. They had a discount, I believe, of two per cent.

Q. Was that the maximum discount of any of your suppliers, cash discount?

A. Two per cent was the maximum discount.

Q. Was taking advantage of that discount important in the operation of your business in 1957?

A. Yes, yes. But unfortunately we were not always in a position to take advantage of that.

Q. Can you estimate for us the percentage of net margin on your total business after taxes and all expenses in 1957, sir?

1110 A. Well, we either made very little profit or we may have sustained a loss that year.

Q. Have you sustained losses in your business in any year?

A. We have sustained losses in other years.

Q. Can you recall the particular year or years?

A. Well, I would say in the past—probably the past four or five years, we have sustained losses or made very little.

Q. Now, if you say you made very little, what do you mean by that? What would be the percentage of profit that you did make, what do you mean, in the years that you made one?

A. It would be very small. It would be a very small percentage.

Q. Would it be as much as five per cent?

Mr. McAleer: I object, your Honor.

Hearing Examiner Buttle: Yes, sustained.

Can you state with reasonable certainty your minimum or maximum losses in 1957?

The Witness: Without having the exact figure, your Honor, it would be hard to give you a truthful answer.

Hearing Examiner Buttle: Well, I said the minimum and maximum.

The Witness: We either sustained a loss that year or—

Hearing Examiner Buttle: In other words—

The Witness: —or we made very little, if any.

1111 Hearing Examiner Buttle: In other words, can you fix the minimum amount, and then fix the maximum amount, if you can, with reasonable certainty? If you cannot, say you cannot, say you do not know.

The Witness: I really do not know, to give you a truthful answer.

Hearing Examiner Buttle: All right, that's the answer.

By Mr. Depro:

Q. Mr. Blackman, did you make any sales of plumbing fixtures in which you arranged for the installation of the fixtures in any way in 1957?

A. There may have been some cases where we would have arranged for the plumber to take care of the installation for the particular account.

Q. Would that be frequent or infrequent?

A. Very infrequent.

Q. Very infrequent?

A. Very infrequent.

Mr. Depro: No further questions, Mr. Examiner.

Mr. McAleer: May we have about a five-minute recess?

Hearing Examiner Buttle: Yes. We will recess for five-minutes.

(Short recess was taken.)

1112 Hearing Examiner Buttle: All right, we will resume, gentlemen.

Cross-Examination by Mr. Fruchterman.

Q. Mr. Blackman, do you recall doing business with a plumber by the name of Rodgers during 1957?

A. I believe so.

Q. And do you recall whether Mr. Rodgers bought those fixtures for use in a group of homes constructed by the Wardco Company?

A. I recognize the name Wardco Company.

Q. Were they a group of shell houses over in Earlton, New Jersey?

A. Yes, sir.

Q. And you recall that transaction taking place?

A. Yes, sir.

Mr. Fruchterman: No further questions.

Hearing Examiner Buttle: All right. Is that all?

Redirect Examination by Mr. Depro.

Q. Do you know, Mr. Blackman, whether all of the fixtures, plumbing fixtures that you sold to Mr. Rodgers were for use in the Wardco Company development?

A. No, sir.

Q. Have you made sales of plumbing fixtures,
1113 other sales of plumbing fixtures, to Rodgers, than the ones you were asked about on cross-examination?

A. I recognize the name Rodgers as a plumber over in Jersey. We have not done any business with him recently that I recognize.

Q. Can you recall in 1957 whether you made other sales to Rodgers?

A. Other sales outside of plumbing fixtures?

Q. No, plumbing fixtures.

A. Plumbing fixtures. I am trying to—he would have bought fixtures to use for the Wardco homes.

Hearing Examiner Buttle: Do you recall selling him plumbing fixtures in 1957?

The Witness: Yes, sir.

By Mr. Depro:

Q. Do you know, Mr. Blackman, during the time that you have sold fixtures to Rodgers, or whether he bought plumbing fixtures exclusively for use in shell houses?

A. I cannot answer that.

Mr. Depro: That's all.

Mr. Fruchterman: No questions.

Hearing Examiner Buttle: Witness excused.

* * * * *

1115 HERMAN BLOCK was thereupon called as a witness for the Commission, and having been first duly sworn, testified as follows:

Hearing Examiner Buttle: Give your name and address to the Reporter.

The Witness: My name is Herman Block. I live at 1925 Chapel Avenue, Cherry Hill, New Jersey.

Direct Examination by Mr. Lipnick.

Q. Mr. Block, what is your business address?

A. 1925 Chapel Avenue, Cherry Hill, New Jersey.

Q. Is that also your residence?

A. Yes.

Q. What business are you in?

A. Plumbing and heating business.

Q. Are you in a particular phase or aspect of the 1116 plumbing and heating business?

A. Yes. I do mostly contracting, installing fixtures.

Q. You are a—

A. I have no shop or no showroom or anything like that.

Q. You are a plumbing contractor?

A. Yes, I'm a plumbing contractor.

Q. Are you a licensed plumber?

A. Yes.

Hearing Examiner Buttle: You do not sell equipment, sir.

The Witness: No, I do not sell any.

By Mr. Lipnick:

Q. When you say you do not sell equipment, sir, do you mean that in the sense that you do not maintain a retail store or other type of business establishment?

A. Yes, that is what I mean. I do not have any shop or anything or showroom for selling.

Hearing Examiner Buttle: But you do sell equipment in connection with an installation maybe?

The Witness: Through a plumbing supply house, yes.

By Mr. Lipnick:

Q. Where are you licensed as a plumber, sir?

A. Camden, Cherry Hill, Collingswood, Oakland, Audubon.

Q. Are those places that you mentioned all in the southern part of New Jersey?

1117 A.. Yes, south Jersey, yes. Mt. Holly.

Hearing Examiner Buttle: Are they all near Camden?

The Witness: Well, Judge, your Honor, they are within a radius of within fifty miles. I do a lot of work for home improvement companies. You have to have a license in each one of these towns.

Hearing Examiner Buttle: You would say your market is within a radius of about fifty miles from your location within the State of New Jersey?

The Witness: Within the State of New Jersey.

Hearing Examiner Buttle: But not in Philadelphia.

The Witness: No.

By Mr. Lipnick:

Q. Mr. Block, were you engaged in the same business in 1957?

A. Oh, yes.

Q. How long have you been in this business, sir?

A. About 25 years.

Q. In 1957, did home owners come to you in connection with the installation of plumbing fixtures in their homes?

A. Well, they come to me the last 25 years, yes.

Q. Did they, as a result of that—did you sometimes install plumbing equipment in their homes in 1957?

A. Oh, yes. I have been installing fixtures for the last twenty years—not only in '57—in quite a few homes.

1118 Q. Did you sometimes install equipment which they had purchased from someone other than yourself?

A. Oh, yes, definitely.

Q. Did you sometimes install equipment which you sold to them?

A. Yes.

Q. Was that equipment which you sold to them sometimes Universal-Rundle equipment?

A. Yes.

Q. When you sold them Universal-Rundle equipment, from what sources or source did you obtain it?

A. Well, from Camden Plumbing Supply, which handled Rundle, or Schreibstone's, which handled Rundle.

Q. Would that Schreibstone's be Henry Supply?

A. Yes, Henry Supply. I call it Henry Schreibstone, and I think Fleck Company used to handle Rundle. I do not know whether they do or not. But I know they used to handle Rundle. Of course, there are quite a few out in the country there that handle Rundle fixtures. There is Danco Plumbing Supply in Merchantville that handles Rundle, that I occasionally bought fixtures off of.

Q. Did you ever buy from anyone in Philadelphia in 1957?

A. I did buy off of—I think—off of Saks, in Philadelphia, through a couple of the home improvement companies, that they told me to order this stuff through those people.

1119 Q. When you purchased Universal-Rundle fixtures in 1957, sir, did you go to just one source of supply, or did you go to several sources of supply before you made your purchase?

A. Well, I used to compare prices quite a bit, because it is a matter of price today, installing fixtures. So I would compare them. I would go from one to the other, and see if they were all about the same price. And I would buy—if one was cheaper, I would buy off the one that was cheaper.

Hearing Examiner Buttle: Was quality a factor in your buying?

The Witness: Your Honor, quality was not a factor.

Hearing Examiner Buttle: What is that?

The Witness: Quality was not a factor.

Mr. Lipnick: I asked him, if Your Honor please, just with reference to buying Universal-Rundle fixtures.

Hearing Examiner Buttle: Well, of course, they sell at different prices, too.

The Witness: As a matter of fact, American Standard fixtures is cheaper than a Rundle fixture today, competitive fixture.

By Mr. Lipnick:

Q. Mr. Block, in connection with your business in dealing with homeowners, did you state before that you sometimes installed fixtures which you did not sell?

1120 A. Oh, yes, many a time.

Q. Has your business been substantially the same from 1954 to the present date in terms of the method in which it is operated?

A. Yes.

Q. And how you deal with your customers, what your customers want, what they do, and what you do?

A. That's correct.

Hearing Examiner Buttle: Is all of it correct—you were asked about ten questions.

The Witness: Well, he can go back to '54, you can go back fifteen years, and my business has been practically on the same order in the last fifteen years.

By Mr. Lipnick:

Q. Mr. Block, could you tell us what some of the brands of plumbing fixtures are that you installed in 1957, which you did not sell to the homeowner?

A. Well, I have installed Kohler fixtures, Richmond fixtures, Standard fixtures, Sears & Roebuck fixtures. I guess pretty near every fixture that is on the market today.

Q. Have you installed, with respect to the companies that you just mentioned—have you installed substantial numbers of the fixtures of each of those companies?

A. Oh, yes, quite a bit.

Q. And while you were installing these fixtures,
1121 did you ever notice that any one company's fixtures contain material and workmanship of a higher quality than any others?

A. Well, only if you pick out a little better fixture in each one of these companies—maybe from a china basin, or a cast iron basin, there is a little difference in price. But as far as the fixtures is concerned, whether it was a china basin or whether it was cast iron, it didn't make no difference.

Q. Well, what I was thinking of was this: given two fixtures which appear to you to be of the same size—let's say two lavatories, two bathroom sets, which appear to you to be of the same size, and which were made of the same material, either cast iron or vitreous china, installing these fixtures made by the companies you mentioned, did you ever notice that the fixtures of the same size of one company were generally or consistently of a higher quality in terms of the material and workmanship in the piece than the fixtures of the other company's?

A. No, it didn't make any difference to me. I never noticed it. It made no difference whether it was a Standard or whether it was a Kohler or whether it was a Richmond or whose make it was. If it was a china 17 by 19 basin, or if it was an 18 by 20 basin, which isn't too much off—you can hardly tell the difference, if you took the same two basins.

1122 Q. Would the same thing be true with respect to the water closets which might have dimensions an inch different in each direction?

A. As far as—

Q. As far as the height of the tank is concerned—if one tank was an inch higher than another?

A. No, as far as installation or quality, as far as I am concerned, it would be all the same—if they were a wash-

down toilet, or if they were an anti-siphon toilet, or if they were a siphon jet toilet—it wouldn't make much difference whether one was a half inch higher, and it doesn't make any difference to the customer. I don't think any of the customers would know the difference.

Q. In 1957, sir, when your customers came to you in connection with the installation of plumbing fixtures, did they sometimes ask you to quote a price for a complete installation, including materials and labor?

A. Yes.

Q. Did they sometimes ask you to quote a price for labor only?

A. Yes.

Q. Did they sometimes ask you to quote both prices?

A. Yes.

Q. And on occasions when you quoted both prices, did they subsequently ask you to install fixtures which they 1123 had not purchased from you?

Mr. Fruchterman. Objection, You Honor. Counsel is now going to a truly leading question. We have not objected to leading questions—on some of these other questions, but this is really—

Hearing Examiner Buttle: Sustained.

* * * * * *

1131 By Mr. Lipnick:

Q. Mr. Block, when your customers came to you in 1957 and discussed the possible installation and the possible purchase of plumbing fixtures, did they indicate, insofar as the purchase of the fixtures was concerned, the factors which were important to them?

A. As far as plumbing fixtures is concerned?

Q. As far as buying the fixtures—did your customers in 1957 tell you that one factor was more important to them as opposed to some other factor?

Hearing Examiner Buttle: In making their selection.

The Witness: Yes, at times. One would pick out—would like maybe a Kohler bathroom, on account of the style—maybe this one—occasionally I would run across one who would say "I want a Sears Roebuck bathroom"—"I want a Standard bathroom". And many times they would say to me, "Mr. Block, I want to buy the fixtures". I would say, "Well, it doesn't make any difference to me if you want to buy them—you buy them." And then many times they would say, "Well, you give us a price on the whole bathroom, and then give us a price just on the installation," and maybe they thought they could buy it cheaper than me and save the 20 per cent of my profit. But I worked it both ways. Many times—I would say 99 per cent of
1132 the time I have supplied the fixtures and installed them. But it did not make any difference. Once in a while I would get one that would say, "Well, I want Standard fixtures," that they would see in a book, or maybe they would want Sears Roebuck fixtures that they would see in a book, or maybe they would want Kohler fixtures that they would see in a book. 75 per cent of them did not make any difference at all, as long as it was a three-piece bath, regardless of whose it was.

By Mr. Lipnick:

Q. Well, with respect to the ones which did not care whose it was, who just wanted a three-piece bathroom, how did they make their choice?

A. Well, I don't know how they made their choice. That I don't know, how they made their choice. I would never go in and tell them any specific bathroom.

Q. Well, would they ever indicate to you that they had bought this particular bathroom set because of some reason other than a preference for that make or that style?

A. No. I do not quite understand you. Will you rephrase that again, please?

Q. Surely. If you do not understand it, I will be glad to rephrase it.

Well, let me ask you this, Mr. Block:—

Hearing Examiner Buttle: Did they indicate any
1133 interest in price?

The Witness: Well, 90 per cent of them—today it is all price.

Hearing Examiner Buttle: Did they indicate any interest in size?

The Witness: Not necessarily, no. The majority of sizes on the bathroom is a standard five-foot tub.

Hearing Examiner Buttle: Did they indicate any interest in quality?

The Witness: No, not 75 per cent of my customers.

By Mr. Lipnick:

Q. Mr. Block, in 1957 did your customers sometimes request you to make an installation of a two-piece set for a powder room?

A. Yes.

Q. Did you do that in 1957?

A. Yes, I have been doing that for the last fifteen years.

Q. In 1957, did you sometimes sell them the fixtures for that installation?

A. Yes.

Q. In 1957 did you do any replacement work with single pieces?

A. Yes.

Q. Did you sometimes sell them the single pieces that were used in the replacement?

1134 A. Yes.

Q. Mr. Block, did you have any employees in your business in 1957?

A. Yes.

Q. How many men did you employ?

A. Three—sometimes four—but mostly always two.

Q. Were they all plumbers or were they something else besides plumbers?

A. No. A couple of them are helpers. And I always had one plumber who has been with me about eighteen years.

Mr. Lipnick: No further questions.

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Cross-Examination by Mr. Fruchterman.

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1143 By Mr. Fruchterman:

Q. Sir, do you do any advertising?

A. Yes. I run a little ad in the Shopper.

1144 Q. I see. That indicates that you are a plumber, licensed plumber?

A. Yes.

Q. Isn't it a fact that when people come to you to have their work done, that they come because of your reputation, which is based on your ability as a skilled tradesman?

A. Yes.

Q. And most of these people, when they do come to you, rely on you because of your skill and experience to get them equipment which in your opinion is worth while, is that right?

A. Yes.

Q. You don't consider yourself as a merchant of any particular brand of product, do you?

A. No.

Q. Actually, what you are selling is your time, skill and ability, isn't that right? Isn't that what draws people to you?

A. Yes—time, skill and ability—yes.

Q. Mr. Block, can you recall when you were interviewed

for the first time by a Federal Trade Commission investigator in relation to this case?

A. Only the time that I was here, last week. I have never been interviewed, or had anybody talk to me about the Federal Trade Commission. There was once a
1145 man called me on the phone and asked me about Sears and Roebuck fixtures, if I ever bought any Sears and Roebuck fixtures. I said I never bought them, but I have installed them.

Q. I see. Do you remember how long ago that was? Was it several years ago?

A. I would say about a year ago.

Q. Was it a man from the Federal Trade Commission?

A. No. I didn't even ask. He give me his name. I didn't—I wasn't that much interested. He just asked me who I was, if I was in the plumbing and heating business, if I ever used any Sears and Roebuck fixtures.

Q. Then aside from that, you have not talked to anyone from the Federal Trade Commission?

A. No. Outside—

Q. Outside of the gentlemen you see here today, last week.

A. Last week, that is right.

Mr. Fruchterman: No further questions, your Honor.

Redirect Examination by Mr. Lipnick.

Q. Mr. Block, with reference to 1957, was a substantial part of your business done with people on the basis of installation only, without you selling them plumbing fixtures?

1146 A. No.

Q. In 1957, sir, can you tell us with a reasonable certainty approximately what your dollar volume of plumbing fixture business was?

Mr. McAleer: I think this is going beyond the cross-examination, Mr. Buttle.

Hearing Examiner Buttle: Well, that is true. But I will allow it.

The Witness: No, not unless I looked at the books. You mean as far as my total—

By Mr. Lipnick:

Q. Your sales of plumbing fixtures in that year.

A. No, I could not tell you that.

Q. Mr. Block—

Hearing Examiner Buttle: Are you referring to the sales of plumbing fixtures, or are you referring to sales of services?

Mr. Lipnick: No—only sales of plumbing fixtures.

Hearing Examiner Buttle: All right.

And that you say you do not recall?

The Witness: No.

Hearing Examiner Buttle: Could you state with reasonable certainty the minimum amount of sales you consummated and the maximum amount?

The Witness: No, I could not.

Hearing Examiner Buttle: In 1957.

1147 The Witness: I could not, your Honor, because if I would buy a bathroom, I might buy $100 worth of other equipment with it—maybe copper pipe and sewer pipe and lead weights and all. As I said, I do a lot of work for these home improvement companies. Lots of times they have a credit in two or three places and they will say—well, I will go in this place and say I need a bathroom to be delivered to such and such a place, and they charge them for it instead of charging me.

Hearing Examiner Buttle: They charge them for it—and you get the material?

The Witness: Yes, they charge them for it, and I get the stuff, because I am the one that has to have it.

1261 CLYDE M. WHITTAKER was thereupon called as a witness for the Respondents and, having been first duly sworn, testified as follows:

Hearing Examiner Buttle: Would you be seated, and give your name and address to the Reporter.

The Witness: Clyde M. Whittaker, 2829 Graceland Road, New Castle, Pennsylvania.

Direct Examination by Mr. McAleer.

Q. Mr. Whittaker, could you tell us what your present position is?

A. I am Chairman of the Board of the Universal-Rundle Corporation.

Q. When did you assume the office of Chairman of the Board of Universal-Rundle?

A. February 1, 1962.

Q. Prior to that date, what was your position with
1262 Universal-Rundle?

A. I was President of the Universal-Rundle Corporation from February 1, 1949 until February 1, 1962.

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1298 *Cross-Examination by Mr. Lipnick.*

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1312 Q. Mr. Whittaker, is it your testimony that you are familiar with the term "promotional overbilling"?

A. Yes.

Q. Is that a term which is applicable to Universal-Rundle's sales to its trade customers?

A. No, sir.

Q. Is that a term which is applicable to Universal-Rundle's sales to Sears Roebuck?

A. Yes, sir.

Q. What does that term mean?

A. It is an amount that Sears directs Universal-Rundle to add to the billing amount that is negotiated which is collected—such amount is collected by us and turned
1313 over to them on a monthly basis on promotional overbilling.

Q. Do you know whether or not Universal-Rundle maintains a separate account for promotional overbilling collections and payments?

A. Yes.

Q. Do they?

A. They do.

Q. Do you know the meaning of the term "freight overbilling"?

A. Yes.

Q. Is that term applicable to Universal-Rundle's sales to its trade customers?

A. It is not.

Q. Is it applicable to Universal-Rundle's sales to Sears Roebuck?

A. Yes, sir.

Q. And what does freight overbilling mean?

A. Freight overbilling is the estimated amount of freight that is added to the billing amount of the piece as negotiated and applied to arrive at the total billing amount of the piece.

Q. Did you say that was an estimated amount of freight?

A. An estimated amount of freight, yes, sir.

Q. What happened when the total freight was higher than the estimated amount?

A. The actual amount of freight was deducted
1314 from the billing amount or from the invoice of the shipment, and compared with the estimated amount, so-called overbilling. And the difference was either in

favor of Universal-Rundle or Sears—and the difference was finally settled on an annual basis, usually.

Q. That was not part of the cost redetermination, was it?

A. No. It was expected to eliminate any question as to the cost of freight.

* * * * *

1321 Q. Universal-Rundle considers that it has only two classes of customers—one is Sears Roebuck and the other is everybody else, is that so?

A. That is so.

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1490 STANLEY S. BACKNER was thereupon called as a witness for the Respondents and, having been first duly sworn, testified as follows:

Hearing Examiner Buttle: Give your name and address to the Reporter.

The Witness: Stanley S. Backner, 28 East Maitland Lane, New Castle, Pennsylvania.

Direct Examination by Mr. Fruchterman.

Q. Are you the same Stanley Backner who testified earlier in this proceeding?

A. Yes, I am.

Q. Mr. Backner, would you describe the duties you perform as an officer of Universal-Rnudle Corporation?

A. I am vice president in charge of marketing. I have the sales division, the advertising, and product de-

1491 velopment department report to me.

Q. Do you yourself make any contacts with the customers of Universal-Rundle Corporation?

A. Yes, I do.

Q. As part of your official duties with that corporation?

A. Yes.

Q. What is the purpose of making these customer contacts?

A. Contact calls with existing customers, and missionary calls, sales promotion calls on prospective customers.

Q. Were you making calls on prospective customers in 1957?

A. I was.

Q. What was the purpose of making those calls?

A. To induce them to become Universal-Rundle distributors.

Q. When you make a missionary call, or when you made missionary calls back in 1957, would you briefly describe your method of operation?

A. I would call on a prospective wholesale distributor, who might be a prospective Universal-Rundle distributor, with the district manager and the regional manager, and would help the regional manager and the district manager outline to him the advantages of distributing Universal-Rundle fixtures.

Q. What were some of those advantages?

A. The stability and progressiveness of the company, the quality of the fixtures, design of the fixtures, breadth of line, occasionally price advantages.

1492 Q. And discussing design, what would you tell a customer, or a prospective customer or purchaser?

A. Well, I would start by telling him that our fixtures either met or exceeded in quality the standards promulgated by the Department of Commerce commercial standards, both for vitreous china and cast iron fixtures.

I would extoll our design, the quality of our fixtures.

I would tell him all the various advantages of handling Universal-Rundle.

Q. What did you mean when you said breadth of line?

A. A wholesaler, in order to handle a line of fixtures, must have fixtures available which would answer just about every requirement that the consumer and/or the public contractor may have in the way of fixtures. And wholesalers are only interested in handling a line that is broad, that has a wide variety of lavatories and bathtubs and closet combinations, because aside from customers individual tastes and design, there are fixtures made for certain very definite purposes, that every wholesaler has to handle.

Q. How broad was this Universal-Rundle line which you were selling in 1957?

A. Well, overall we produce, or we did in 1957, too—we produce about 800 different fixtures. That, of course, includes the various fixtures in various colors, you understand, various rough-in measurements, all types of 1493 lavatories, different types of bathtubs and so on.

Q. Would that breadth of line which you have mentioned for Universal-Rundle exceed or be equal to other competing lines of manufacturers?

Mr. Lipnick: I will object to that, your Honor. I think that question is too vague.

Hearing Examiner Buttle: I will allow it, with explanation.

The Witness: The broadest line of manufacturing in this country is American Standard. We make a line which is not quite as broad as American Standard. We make a line that is perhaps broader than Ingersoll-Humphries. So we are about in the middle as far as breadth of line is concerned.

Hearing Examiner Buttle: By breadth of line do you mean—

The Witness: I mean a variety—

Hearing Examiner Buttle: —different models, variety of models?

The Witness: That is right, sir. As I answered in the original question regarding breadth of line, it includes fixtures for a variety of purposes, variety of installations.

By Mr. Fruchterman:

Q. Can you state whether or not this variety of line 1494 has any effect on the selling price of a line?

A. The broad line is more desirable. The broader the line, the more efficient the wholesaler is in selling plumbing fixtures.

Now, certainly the narrowest line carries usually the lowest prices. As the line gets broader, it becomes more valuable and can command a higher price.

Q. Is there a name given to these shorter lines?

A. No, not particularly, except that the manufacturers who make only vitreous china plumbing fixtures are called monoline manufacturers.

Q. What are some of those monoline manufacturers?

A. Peerless—

Mr. Lipnick: If your Honor please, I am going to object at this point. I do not see how it can have any relevance to this proceeding what manufacturers make only vitreous china fixtures.

Mr. Fruchterman: Do you wish us to approach the bench on this, your Honor?

Hearing Examiner Buttle: Well, go ahead, question him. That will just take more time. You can make a motion to strike, unless it leads up to something. I will receive it subject to connection. Objection overruled, subject to a motion to strike.

The Witness: Peerless Pottery, Kilgore Ceramics,
1495 Mansfield Pottery, Chicago Pottery, Case Manufacturing Company, Dixie Pottery, Western Potteries, Fords Porcelain.

By Mr. Fruchterman:

Q. Are all these companies which you just named manufacturers of vitreous china only?

A. That is right.

Q. Now, what are some of the manufacturers of both vitreous china and cast iron fixtures?

A. American Standard is the largest. Kohler, Crane, Eljer Division of Murray Corporation, Rheem-Richmond, Ingersoll-Humphries, National U. S. Of course Universal-Rundle.

Q. Do you have an opinion, based on your experience in this industry, as to whether or not the prices charged by the monoline companies are higher, lower, or the same as those charged by the full-line companies?

Mr. Lipnick: If your Honor please, I object. I do not know—we have to be talking about comparable products, if we are going to compare prices. And there is nothing showing that these other products are of like grade and quality with specific products of Universal-Rundle.

Hearing Examiner Buttle: Well, I suppose that what Mr. Fruchterman is doing is leading into evidence which will be explanatory in some respects of cost justification. If it is not for that purpose, I would not know what purpose it was for. But on the other hand, I can see that that
1496 is where he might be leading. If he is not, he should be leading in that direction.

Mr. Fruchterman: Well, if your Honor please, this is also introduced on the question of like grade and quality or marketability of products at prices.

Hearing Examiner Buttle: But that is so general, that sort of an explanation, it places the reason for the evidence up in the ether. On the other hand, I can see where there could be some merit to the position taken by you to show that if there is a diversified line, and as a matter of fact the market is limited with regard to certain products, be-

cause of this diversification to suit special needs, which I assume is what the witness was leading up to, that might impute in some respects, if otherwise supported, that were products that were specially constructed, under certain specifications, but not for the general market, that under certain circumstances they could be more costly and other circumstances the volume was sufficient that they could be less costly.

Mr. Depro: Mr. Examiner, the cost and the prices of these other companies have no bearing, it seems to us, on the question of whether this respondent has violated—

Hearing Examiner Buttle: What you say is true. But apparently an attempt is being made to explain something to me. But I do not understand Mr. Fruchterman's 1497 reasons for it.

I will allow it subject to connection. But I would certainly be inclined to strike it, if it does not lead somewhere, if the motion is made by counsel for the Commission.

All right, Mr. Fruchterman.

Mr. Fruchterman: I believe we have a question pending.

(The Reporter read the question as follows:

"Question: Do you have an opinion, based on your experience in this industry, as to whether or not the prices charged by the monoline companies are higher, lower, or the same as those charged by the full-line companies?")

The Witness: They are very much lower. The shorter the line, the lower the price.

Hearing Examiner Buttle: You say the shorter the line, the lower the price?

The Witness: Yes, sir.

Hearing Examiner Buttle: Well, by short-line you mean they only make a few items?

The Witness: That is right.

Hearing Examiner Buttle: That really confuses me—that is why I made the statement I did. I would assume that the shorter the line, the more expensive the price.

1498 The Witness: No, sir, that is not true in the plumbing industry.

Hearing Examiner Buttle: How do you account for that? That I would like to know.

The Witness: The wholesaler desires the broadest line he can buy in order to supply his customers with everything they may need for their installations. The manufacturer who is only capable of making a short-line cannot supply the wholesaler with all the items he needs. Therefore, the wholesaler has to go to another manufacturer to complete his line. Therefore, the short-line manufacturers are forced to charge prices anywhere from 10 to 20 per cent lower than the full-line manufacturers.

Hearing Examiner Buttle: Oh, you are referring to the use of certain equipment in connection with the particular line—that is, with a certain line you would include all the fixtures, and that item is more expensive; if you do not include all the fixtures, is less expensive?

The Witness: No, sir. Let me give you an illustration. We make today six different bathtubs, aside from rights and lefts.

Hearing Examiner Buttle: Yes.

The Witness: Those six different bathtubs are needed for a variety of installations. If the wholesaler is

1499 buying from the manufacturer who only makes two different kinds of bathtubs, then he has to buy the four other bathtubs from other manufacturers. Therefore, the manufacturer who only makes two bathtubs, in order to induce the wholesaler to buy from him, has to give him price concessions.

We manufacture probably 20 different types of lavatories. A monoline company may only make two different

types of lavatories. So the other 18 are needed. And if the wholesaler is to buy them, he might have to pay a premium for them if he buys from other manufacturers.

Hearing Examiner Buttle: So what you are telling me is in order to compete, the manufacturer that has the so-called short-line, involving only two items, would have to give a better price in order to compete with the manufacturer having more lines, or a complete line, which the purchaser could buy.

The Witness: That is right, sir.

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1500 By Mr. Fruchterman:

Q. When you talk to prospective purchasers, and when you did talk to prospective purchasers of the Universal-Rundle line of fixtures back in 1957, did you discuss prices with these people?

A. Yes, sir.

Q. What would that discussion entail?

A. Outlining our terms of sale, any advantages we might have had on certain fixtures.

Q. Were price comparisons with the products of competing lines discussed?

A. Oh, yes.

Q. Would these be discussed on an individual product basis, or on an overall product basis?

A. Oh, no. You discuss price on the entire line.

Q. When a prospective customer does agree to handle Universal-Rundle, do they handle the entire line?

A. That would be the only basis we would sell them on. We are not interested in selling individual fixtures. We are interested in selling Universal-Rundle itself. Therefore we sold them the entire line and demanded that they would stock the entire line.

• • • • •

1501 By Mr. Fruchterman:

Q. During the year 1957, did you endeavor to have your customers handle the entire line?

A. Yes, sir.

Hearing Examiner Buttle: Does the testimony that you have just given relate to the period of 1957?

1502 The Witness: Yes, sir, it does.

Hearing Examiner Buttle: As well as other years?

The Witness: Yes, sir.

By Mr. Fruchterman:

Q. Are you familiar with a firm operating in Philadelphia by the name of Mars Supply?

A. Yes.

Q. Do you know whether Universal-Rundle sold to that company during 1957?

A. Yes, I do.

Q. Is Universal-Rundle selling to that company now?

A. No, sir, I do not believe it is.

Mr. Lipnick: I move to strike, sir, unless this is confined solely to the question of relief. We are going beyond 1957 now.

Hearing Examiner Buttle: Yes.

Mr. Fruchterman: Your Honor, I think I am entitled to show bias on the part of the government's witnesses.

Hearing Examiner Buttle: Well, you mean you are entitled to show bias through—

Mr. Fruchterman: May we approach the bench, Your Honor?

Hearing Examiner Buttle: All right.

(Discussion off the record.)

Hearing Examiner Buttle: On the record.

1503 By Mr. Fruchterman:

Q. Do you know whether or not the decision to end this customer relationship with Mars was made by Mars or was made by Universal-Rundle?

A. Made by Universal-Rundle.

Hearing Examiner Buttle: Off the record.

(Discussion off the record.)

Hearing Examiner Buttle: On the record.

By Mr. Fruchterman:

Q. Did you have a customer in 1957 in Camden, New Jersey, by the name of Henry Arensberg?

A. Yes, we did.

Q. Are you still selling to that customer?

A. No, we are not.

Q. Do you know whether or not the decision to terminate the business relationship between Henry Arensberg and Universal-Rundle was made by Henry Arensberg or was made by Universal-Rundle?

A. Universal-Rundle.

Mr. Lipnick: If Your Honor please, at this point I will move to strike the testimony with respect to Mars Supply and with respect to Mr. Arensberg and I will object to further continuation of testimony along this line for the reason that the testimony with respect to these two customers so far shows that they did not stop buying from
1504 Universal-Rundle; Universal-Rundle decided to discontinue doing business with them.

Now, since absolutely no foundation was laid when these witnesses testified, that there can be no basis for concluding that because Universal-Rundle stopped dealing with them, they are biased against Universal-Rundle to the extent that they would testify falsely in this proceeding.

Hearing Examiner Buttle: Well, of course, what you say is true, if it ends here. But I assume Mr. Fruchterman has some other questions. If he has no other questions, I shall strike it.

The termination of the business, that is something you should have brought out during the course of your cross-examination.

Do you have any further questions to ask about this, or are you going to leave it there?

Mr. Fruchterman: No, I have further questions.

Hearing Examiner Buttle: All right.

Mr. Fruchterman: But I would prefer to go through the list of witnesses first, to establish that this applies to all.

Hearing Examiner Buttle: You mean you are not going to have the witness testify as to the circumstances under which—

Mr. Fruchterman: Yes, we are, but it will apply 1505 to the entire group.

Hearing Examiner Buttle: All right. Hurry it up. I thought you had a list you were going to ask him about.

By Mr. Fruchterman:

Q. Do you recall whether during 1957 Universal-Rundle sold to a wholesaler by the name of Nat Friedman & Sons?

A. Yes, they did.

Q. Does Universal-Rundle continue to sell to Nat Friedman & Sons?

A. No, we do not.

Q. Was the decision to terminate this business relationship made by Nat Friedman & Sons or was it made by Universal-Rundle?

A. By Universal-Rundle Corporation.

Q. Do you know whether or not in 1957 Universal-Rundle sold to a customer, a wholesaler by the name of Black & Brown?

A. Yes, they did.

Q. Do you know whether or not Universal-Rundle continues to sell to Black & Brown?

A. They do not.

Q. Do you know whether the decision to terminate—

Hearing Examiner Buttle: Who decided to end the business relationship?

The Witness: I did.

1506 Hearing Examiner Buttle: All right.

By Mr. Fruchterman:

Q. Would your answer be the same for—do you recall—

Mr. Lipnick: If Your Honor please, before we have any more questions along these lines, I would like a ruling that this evidence relates solely to the question of bias, or possible bias on the part of the Commission's witnesses.

Hearing Examiner Buttle: I do not know whether it does or not.

Mr. Lipnick: Mr. Examiner, this case—

Hearing Examiner Buttle: Just a moment. I understand your objection. You have a continuing objection. I have indicated to you that I was receiving it subject to connection. I am receiving it subject to connection. If bias is not in any sense of the word reflected inferentially or otherwise as a result of this evidence, if you will make a motion to strike, I will strike. If it does show by inference possibly some bias, then I will deny your motion.

Mr. Lipnick: My concern at this point with respect to this evidence is the stipulation under which this case is tried. I would just like it clearly established that this evidence cannot relate to any of the merits of this proceeding, but only to the issue of bias.

Hearing Examiner Buttle: Cannot relate to what?

1507 Mr. Lipnick: Any of the merits of this proceeding —but can only relate to the question of possible bias.

Hearing Examiner Buttle: Yes.

By Mr. Fruchterman:

Q. Could you state the reasons why—

Hearing Examiner Buttle: At best, that is all it can relate to.

By Mr. Fruchterman:

Q. Can you state the reasons why Universal-Rundle decided to terminate these customers?

A. That type of customer was not profitable to us. We needed a customer who handled a more complete line than that type of customer was willing to buy. They picked up at our plants. That type of operation is very, very expensive to the company. We prefer to ship in truckload lots.

Hearing Examiner Buttle: You mean you established a policy of doing what?

The Witness: Of getting a better type of distributor than the distributors that we had.

Hearing Examiner Buttle: What do you mean by a better type of distributor?

The Witness: Who is capable of handling more of the items we manufactured.

Hearing Examiner Buttle: A more extensive line?

1508 The Witness: More extensive line, and more profitable items. Our experience with these—

Hearing Examiner Buttle: And who would buy in larger volume?

The Witness: That is right, sir. And who would not have to send us his truck around to pick up his entire purchase from our plant.

Hearing Examiner Buttle: You wanted to sell to larger volume buyers, is that what you're telling me?

The Witness: That is right, sir.

Hearing Examiner Buttle: Well, after you established that policy, did you hear from any of these customers who have been named with regard to their concern about not being able to do business with you?

The Witness: Yes. They objected to—

Hearing Examiner Buttle: Who objected?

The Witness: I would say the majority of the ones named by Mr. Fruchterman.

Hearing Examiner Buttle: Of those named, which ones objected?

The Witness: I cannot tell you exactly the ones, Mr. Buttle. I would say that the majority of them objected to it.

Hearing Examiner Buttle: Strike the answer with regard to "majority".

Mr. Lipnick: I am going to move to strike the
1509 entire line of testimony at this point, sir.

Hearing Examiner Buttle: Yes, strike it.

Mr. Fruchterman: If Your Honor please, I think we are entitled to have on this record the exact—

Hearing Examiner Buttle: Well, what bias does that show?

Mr. Fruchterman: I think, Your Honor, that anytime a man is terminated because his services are not adequate, he would not have too good a feeling towards the corporation, and he certainly will not have the same attitude towards a supplier as customers would with whom the supplier is still dealing.

Now, they went out and intentionally picked—strike that, please.

Hearing Examiner Buttle: You had better strike it.

Mr. Fruchterman: Every customer who was called upon to testify here was a former customer and a customer terminated because of the inadequacy of their operations. Now, these reasons were made known to these people. I am certain that their attitude towards Universal-Rundle is influenced by this. And I think it is properly in the record.

Mr. Lipnick: Mr. Examiner, if I may state—number one, the mere fact that a business relationship is terminated, no matter whose decision, and no matter what
1510 the reasons are, has absolutely no bearing whatsoever on whether a man will testify falsely under oath.

Hearing Examiner Buttle: It may have some bearing.

But on the other hand, there is no indication that in this particular case it did have a bearing. If it had been shown that it had a bearing, if there was evidence of the fact that one of these witnesses had contacted Mr. Backner, and I had some evidence indicative of the fact that a certain amount of animosity developed because of the fact that they were deprived of buying Universal-Rundle products, I would allow it in.

But Mr. Backner does not remember what was said to him, he does not remember who contacted him. He just indicates that a majority of them indicated that they did not like it. That kind of evidence has no probative weight with regard to bias or anything else.

Mr. Depro: This is not the way to challenge the credibility of those witnesses, either.

Hearing Examiner Buttle: Well, the right way to have challenged the credibility of the witness was to ask the witness on cross-examination, and then contradict that witness as a result of the testimony of Mr. Backner. But just these general statements to the effect that a majority of them were unhappy because they could not do business with Universal-Rundle does not establish bias.

1511 Mr. Fruchterman: Your Honor, I would say that the fact that the statement was general may go to the weight. But it certainly does not go to the admissibility.

Hearing Examiner Buttle: It has no weight the way you presented it, Mr. Fruchterman.

Mr. McAleer: I also point this out, Mr. Buttle. Each of these witnesses testified with respect to the injury to competition between their reselling of plumbing fixtures bought under the Universal-Rundle line, and competition with Sears Roebuck.

I think, sir, that testimony along these lines goes to the question of whether or not there could have been a substantial lessening of competition because the customers

were terminated by Universal-Rundle, and it was not the decision of the customers involved. In other words, sir, they would have continued to buy Universal-Rundle plumbing fixtures, so they could not have been so competitively injured in their competition with Sears Roebuck. They were willing to continue to buy Universal-Rundle fixtures.

So when we talk in terms of how substantially injured they were because of the competition that existed in 1957, we can point out that they would still be willing to buy the fixtures, but the decision was made by Universal-Rundle to terminate these customers.

Mr. Depro: That certainly does not negate the injury—
lack of injury, Mr. Examiner. They do not have to
1512 knock them out. We do not have to knock them out,
or be knocked out as a result of this.

Hearing Examiner Buttle: Well, as a matter of fact, with regard to any of the evidence that was introduced in the Commission's case, I do not know as I am going to determine injury based on the opinion of these witnesses, as to whether or not they would be injured. I can alleviate your fears in that respect. But I am certainly not going to judge it on that basis.

It will be the cold fact as to whether or not in the market there was an actual loss or lessening of competition as a result of the better price to Sears, if there was a better price.

I did not hear any evidence in the Commission's case which would indicate to me for one moment that any of those witnesses were speaking from bias.

Now, with regard to any opinions they may have had, this case is going to be based on more than just opinion, I will tell you that.

But to me, to try to claim bias simply because the business with these witnesses has been terminated, and just ended there, and have me infer from that, and that alone,

that they are biased—if they got into a big conflict with Mr. Backner, and there was something to support this, then I would certainly receive the evidence. And then
1513 I would have to receive it, because it would certainly have some probative weight on the issue of bias.

But what you have introduced—unless, as a matter of fact, you can develop it a little more, I am not going to receive it.

If you wish to refresh Mr. Backner's recollection with regard to discussions he had with some of these individuals as a result of conversations—but he has expressed nothing but a general opinion to the effect that he thinks they were biased because a majority of them complained.

Mr. Lipnick: He has not even said that.

Hearing Examiner Buttle: When did they complain, who complained, what did they complain about, what did they say, what did they indicate to him? That is the kind of evidence that has some probative weight, which I must consider. But what you are adducing has no probative weight.

Now, either develop it or my ruling stands—period.

Mr. Fruchterman: May I just bring out one point, Your Honor.

Mr. Lipnick: I object to further argument of counsel on this point.

Hearing Examiner Buttle: Yes.

Mr. Lipnick: Let him have an exception on the record if he wants to make any further argument.

1514 Hearing Examiner Buttle: Well, he has the exception automatically.

You may develop it, if you wish. You may refresh Mr. Backner's recollection, if you wish. But if you are unwilling to do that, it has no probative weight.

Would there be any records, Mr. Backner, that would refresh your recollection in that connection?

The Witness: No, sir, there would be none.

Hearing Examiner Buttle: Did you have any conversations with any of these gentlemen?

The Witness: Yes, I did.

Hearing Examiner Buttle: You did have such conversations?

The Witness: I did have such conversations.

Hearing Examiner Buttle: Can't you remember with whom you had any conversations?

The Witness: Yes, I can remember I had conversations with Arensberg.

Hearing Examiner Buttle: With who?

The Witness: Arensberg.

Hearing Examiner Buttle: Yes. And about when did that happen?

The Witness: That happened immediately after we decided to discontinue selling him.

Hearing Examiner Buttle: When was that?

1515 The Witness: That is the thing I cannot remember, sir.

Hearing Examiner Buttle: When did you decide to discontinue?

The Witness: It was a period subsequent to 1957.

Hearing Examiner Buttle: Well, was it 1958, 1959 possibly?

The Witness: I cannot honestly answer that, sir.

Hearing Examiner Buttle: You say it was subsequent to 1957.

The Witness: Yes, sir.

Hearing Examiner Buttle: Was it last year?

The Witness: Oh, no, sir.

Hearing Examiner Buttle: Was it the year before last?

The Witness: I would say it was either '57 or '58 or '59.

Hearing Examiner Buttle: All right.

Now, you had a conversation with him. What kind of a conversation did you have with him?

The Witness: Well, he objected very strenuously.

Hearing Examiner Buttle: What did he say?

The Witness: He said, "I would like to continue buying Universal-Rundle fixtures. Why won't you sell me any more?" And I told him that his business was not
1516 profitable to us, that we could not afford to handle that type of business. He was rather angry.

Hearing Examiner Buttle: What did he say to you? What did he say to you that indicated his anger?

The Witness: I really cannot say, sir. I cannot remember exactly what he said to me. I know that he was angry about it and I remember very definitely—

Hearing Examiner Buttle: What did he do that led you to believe that he was angry?

The Witness: Well, he probably said "the dickens"—

Hearing Examiner Buttle: Well, forget about what he probably said. What did he say? What observation did he make that led you to believe that he was angry? You obtained that reaction somehow. What did you observe or what did he say that led you to believe that?

The Witness: He telephoned me, Mr. Buttle, and objected very strenuously to us discontinuing selling him. He said he had been purchasing Universal-Rundle, or purchasing Universal Sanitary, which was the predecessor of Universal-Rundle, for a great many years, and he did not understand why we would not continue selling him.

Hearing Examiner Buttle: Yes.

The Witness: I told him that his business was very definitely unprofitable to us, we could not make any money on his business, and we had to seek the kind of dis-
1517 tributors whom we could make a profit. And he said he certainly could not understand our decision, he thought it was a wrong one, and he objected very strenuously. And I said that I would not change my mind, that that was the decision.

Hearing Examiner Buttle: Well, was there animosity in his voice when he spoke to you over the telephone?

The Witness: Yes, sir. He raised his voice to me, and I probably raised—excuse me—I raised my voice to him, and told him strictly it was our decision, and we would decide to go along with our policy—that was our policy.

Hearing Examiner Buttle: That was Mr. Arensberg?

The Witness: That was Mr. Arensberg.

Hearing Examiner Buttle: Now, do you recall any conversations with anyone else?

The Witness: I could not say definitely, sir. I definitely remember that Mr. Arensberg conversation.

Hearing Examiner Buttle: All right. This is my ruling. With regard to Mr. Arensberg, I will allow it. With regard to the others, I will not allow it, because it does not appear that there is sufficient evidence upon which I can possibly decide that there was any bias. There is no recollection on the part of the witness that he recalled any of the conversation. There is no recollection of the witness as to exactly what person or persons indicated the
1518 new policy was objectionable to them. Therefore, I will strike the evidence relating to this bias question, except as to Mr. Arensberg. That I will allow.

That settles it.

* * * * * *

1521 By Mr. Fruchterman:

Q. Is pricing the trade line which is sold by Universal-Rundle part of your responsibility as vice president?

A. Yes, it is.

Q. Now, from time to time have you had occasion to change or alter the prices at which Universal-Rundle sells its products to trade customers?

A. I do.

Q. How are these prices changed? What is the mechanism of it?

A. Mechanically, they are changed by means of bulletin, which is issued by the Customer Service Department of the corporation.

Mr. Fruchterman: I would like for the record to indicate that we have marked a group of exhibits for identification as Respondent's Exhibits 16-A thru 28-B.

(The documents referred to were marked as Respondent's Exhibits 16 thru 28-B for identification.)

1522 May we recess for a moment, sir?

Hearing Examiner Buttle: All right. We will take a three-minute recess.

(Short recess was taken.)

Hearing Examiner Buttle: Back on the record.

By Mr. Fruchterman:

Q. Mr. Backner, I now show you a group of documents which have been marked as Respondent's Exhibits 16 thru 28-A and B, and I ask you to inspect those documents.

Have you seen those documents before, sir?

A. Yes, I have.

Q. Are they taken from your records?

A. They are.

Q. Are they documents which were created in the normal course of business?

A. They are.

Q. What are those documents used for?

A. For notifying various people in the organization of price changes.

Q. Well, now, were these documents in effect during the year 1957?

A. They were.

Mr. Fruchterman: I now offer Respondent's Exhibits 16 thru 28-A and B in evidence, Your Honor.

Mr. Lipnick: If Your Honor please, I have no
1523 objection to the receipt of these documents, subject to connection, with the exception of Respondent's Exhibit 16, to which I object specifically on the grounds that it is illegible. However, I would have no objection to the receipt of a legible copy of that document, also subject to connection.

Mr. Fruchterman: We will endeavor to get a more legible copy.

Hearing Examiner Buttle: All I can say is I can read 16, with difficulty.

I will receive in evidence Respondent's Exhibits 16 thru 28-B heretofore marked for identification.

(The documents heretofore marked RESPONDENT'S EXHIBITS 16 thru 28-B for identification were received in evidence.)

Hearing Examiner Buttle: I invite the attention of counsel to the—that it would be preferable to substitute a more readable copy of respondent's Exhibit 16, and in the event that such copy can be procured, I order that it be substituted for the one now being received in evidence.

Mr. Lipnick: And are those received unconditionally, or subject to connection?

Hearing Examiner Buttle: They are received subject to connection.

1524 Mr. Fruchterman: We will endeavor to get a better copy of that.

Hearing Examiner Buttle: All right. They will be received subject to connection.

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Q. What relationship did these documents, received as Respondent's Exhibits 16 thru 28-A and B—

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1525 Q. —bear to the published price list—

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Mr. Fruchterman: —which are already in evidence in this proceeding?

* * * * *

1526 Hearing Examiner Buttle: If they do have any relationship.

The Witness: Yes, sir, they have a relationship. They deal with the same products listed on those price sheets, and they represent special prices which were made at various times during the year 1957.

Hearing Examiner Buttle: Well, changes in the prices that were on the price list, is that what you're telling me?

The Witness: That is right, sir.

Hearing Examiner Buttle: All right.

* * * * *

1530 By Mr. Fruchterman:

Q. Mr. Backner, are you familiar with the term "project pricing" as used in the plumbing industry?

A. Yes, I am.

Q. What does that term mean?

A. It means a price which is given on either one large building of various types, like a school or an apartment house, a hospital or a group of residential dwellings.

Q. Did Universal-Rundle grant project prices to 1531 wholesalers in 1957 in Philadelphia?

A. Yes, it did.

Q. What are the mechanics of this operation?

A. The builder, when he plans his project, asks his plumbing contractor for a price on the plumbing fixtures as well as on the installation of those plumbing fixtures in that project. The plumbing contractor then goes to the wholesaler and ask him to quote on the variety of material that is needed in this project and the wholesaler then comes to the plumbing fixture manufacturer and asks him for prices for fixtures to be used in that project.

Q. Is there ever an occasion where more than one wholesaler will request a manufacturer such as Universal-Rundle to give project prices on the same project?

A. Oh, yes, in all cases there are several wholesalers and several plumbing contractors quoting on the same project.

Q. Now, when that occurs what does Universal-Rundle do?

A. Universal-Rundle quotes the same prices to all of the wholesalers that ask for prices, or maybe in instances it will refuse to quote a wholesaler a price because he is not a Universal-Rundle distributor.

Q. Are you able to state with a reasonable degree of certainty that during 1957 when more than one wholesaler requested you to bid on a project in the Philadelphia 1532 area that the same prices would be quoted to every wholesaler so requesting for the same project?

A. Very definitely.

Q. How long in terms of time does a project quotation last?

A. Well, a project quotation lasts ninety days, but after the order is placed for the fixtures for the project then we have a term of six months for delivery at the same price providing it is speculative housing; providing it is a project of a certain number of speculated houses. If it is a project which is under one roof like a hospital or public building or some kind of an apartment house, then those prices last for the duration of the project; until it is completed. In some cases as long as two years or three years.

Q. Why is that distinction made between projects under one roof and projects of speculative housing?

A. When a builder builds a quantity of speculative housing he usually asks for prices on a hundred or two-hundred units and he will put up twenty-five and if the twenty-five units sell then he will put up twenty-five more,

etc. Therefore we limit the price protection on that type of project to six months because we don't want to extend it unduly and have him take advantage of lower prices if we get a price advance. Whereas, if it is a project under one roof then we know that the builder will
1533 have to complete that building in accordance with the plans and we are willing to continue supplying fixtures for that type of project until its completion.

Q. Is Universal-Rundle the only manufacturer which grants project prices?

A. No, sir, all manufacturers grant project prices.

Q. Were they doing so in 1957?

A. Yes, they were.

Q. Can you name some of the manufacturers in Philadelphia who were also granting project prices?

A. American Standard, Kohler, Crane, Eljer, Marine Richmond, Ingersoll, Humphries, Mansfield, Chicago Pottery, Peerless, Case, Briggs.

Q. What does the term "price protection" mean as used in the plumbing industry?

A. At the time of a price advance it is the industry custom to give a wholesaler an opportunity to purchase a number of fixtures at the old price, at the lower price. The usual amount which the wholesaler may purchase is one-twelfth of his previous year's purchases. In other words, when the price bulletin is issued stating that prices as of such and such a date do advance and that date is immediate the wholesaler still has an opportunity to purchase one-twelfth of his previous year's purchases at the lower price. Now, the other item of price protection
1534 is the project prices which I have outlined to you.

Q. Was that price protection policy followed by Universal-Rundle in 1957 in the Philadelphia-Camden area?

A. Yes, it was.

Q. Do you know whether that price protection policy

such as you have just described was followed by other companies doing business in the Philadelphia-Camden area in 1957?

A. Yes, it was.

Q. Do you know whether or not it was the custom of the plumbing fixture manufacturers doing business in 1957 to grant truckload prices?

A. Yes, I do.

Q. Was there such a custom in 1957?

A. There was.

Q. Do you know the names or are you able to state the names of any plumbing fixture manufacturers who did grant truckload discounts on plumbing fixtures in the Philadelphia-Camden area in 1957?

A. Yes.

Q. Would you state some of them?

A. Ingersoll-Humphries, Richmond, Briggs, Gerber, Case.

Q. Do you know whether or not during the year 1957 these truckload discounts were stated in the price bulletins published by those companies?

A. As a rule they were not. A few of the smaller 1535 companies did state that fact in their price bulletins.

Mr. Fruchterman: I would now like to have marked for identification a group of documents as Respondent's Exhibits 31-A, B and C; and 32-A, B, C, D, E and F.

(The documents referred to were marked Respondent's Exhibits 31-A, B and C and 32-A, B, C, D, E and F for identification.)

By Mr. Fruchterman:

Q. Mr. Backner, I show you now Respondent's Exhibits 31-A through C and 32-A through F and ask you if you have ever seen those documents before?

A. Yes, I have.

Q. Were those documents taken from records kept in your office?

A. They were.

Q. What are the type of records those records were taken out of?

A. Competitive prices.

Q. Do you keep competitors' prices in the normal course of your business?

A. We do the current competitors' prices.

Q. Do you recall when these, or approximately at what time these price lists were removed from your files?

A. No, I do not.

Q. Were they removed in the last several months?

1536 A. Oh, yes.

Mr. Lipnick: Let me see those once more.

By Mr. Fruchterman:

Q. Were they current at the time they were removed?

A. Right.

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Mr. Lipnick: I am objecting to the introduction into evidence of both of these documents, sir. I think you will note Respondent's Exhibit 31-A bears the date January 1, 1961, and with respect to Respondent's Exhibits 32-A through F, on 32-B the date is stated March 9, 1959; and on that ground, sir, I submit that these documents are totally irrelevant to this case.

Hearing Examiner Buttle: Off the record. . . .

1537 Back on the record. The objection is sustained on the ground that the proper foundation has not been laid for the introduction of the documents. However, you may proceed to interrogate the witness for the purpose of laying an appropriate foundation.

By Mr. Fruchterman:

Q. I direct your attention to Respondent's Exhibit 32-B and Respondent's Exhibit 31-A and I ask you if these

documents represent published statements of certain quantity discounts currently being granted by certain of your competitors?

A. They do.

Q. Now, when you answered the question relative to the year 1957 that certain of your competitors published quantity discounts, were these the type of discounts to which you referred?

A. They were.

Q. And are you able to state that based on the information which you have currently and your experience in selling plumbing fixtures that the same policies which these companies are following today are the policies which they followed in 1957?

A. Yes, I can.

Hearing Examiner Buttle: What are you asking him, did he grant discounts in 1957?

1538 Mr. Fruchterman: Yes, and I intend to show that this is their policy and this is documentary proof of the statement.

Hearing Examiner Buttle: Did they grant the same discounts in 1957 that they granted in 1959?

The Witness: Yes, sir.

Hearing Examiner Buttle: Identically the same?

The Witness: Yes, sir.

Hearing Examiner Buttle: All right.

1539 Mr. Fruchterman: Your Honor, the purpose of these is to substantiate with documentary evidence the statements of the witness. Now, if you are worried about the date on the document—

Hearing Examiner Buttle: Well, I am not worried about the date any more. You ought to know that the witness has stated that those are not the discounts granted in 1959 only but he has stated that those are discounts on those very papers which were existent in 1957.

Mr. Fruchterman: Well then, Your Honor—

Hearing Examiner Buttle: You can assume for the purpose of what has been established that what was on those papers is reflective of discounts in 1957. That is apparently what you wanted to show. My question is: Why?

Mr. Fruchterman: Because—

Hearing Examiner Buttle: Why as to competitors?

Mr. Fruchterman: The purpose of the introduc-
1540 tion is so that I will not subject myself or my client to the accusation or the comment on the evidence—

Hearing Examiner Buttle: What does that evidence have to do with the case? Forget subjecting yourself.

Mr. Fruchterman: This is documentary evidence, Your Honor, and the fact is I don't want to be put in the position of having a statement or some of my evidence criticized as a mere assertion on the part of a company official, a self-serving declaration, and having a question asked in a brief or proposed finding as to why wasn't documentary proof put in.

Hearing Examiner Buttle: Well, you are not dependent upon the documentary proof because it is through this witness that you have evidence to the effect that these discounts were in effect in 1957. So what kind of documentary proof is that, corroborating the testimony of the witness? Establishing the fact that these were discounts in 1957 depends upon the testimony of the witness. I don't follow you.

Mr. Fruchterman: Well, we are endeavoring to prove that competitors grant these truckloads discounts, that as a matter of fact this isn't just an assertion on the part of a company official, that documentary proof exists of this and it is current proof.

Hearing Examiner Buttle: Well, it is still an
1541 assertion of this witness, and maybe it is an assertion that should be believed, but what is the purpose

of showing the discounts that your competitors are offering? How does that help you?

Mr. Fruchterman: As I understand, Your Honor, this statute has a proviso in it that you may meet competition.

Mr. Depro: Mr. Examiner, there is no evidence—

Hearing Examiner Buttle: Do you have a meeting competition defense? Have you interposed a meeting competition defense? I have forgotten because I had my mind so set on cost justification. Do you have it in your answer?

Mr. McAleer: We have it in our answer.

Mr. Depro: You certainly can't take this evidence as evidence of what the prices were in 1957 even though the discount may have been the same. These documents are way beyond the date of 1957.

Mr. Fruchterman: Well, if that is the case—

Hearing Examiner Buttle: Just a minute. The witness has testified that these are the discounts that were in effect. Of course, this evidence in and of itself doesn't indicate that because it was the discount the discount was for the purpose of meeting a price and, as a matter of fact, the Respondent would have to adduce additional evidence substantiating the fact that they were introducing evidence in support of meeting competition as a defense; and
1542 they would have to tie up this evidence with other evidence which they may adduce in that connection. Now, is that your purpose or isn't it your purpose?

Mr. McAleer: That may be one of our purposes.

Hearing Examiner Buttle: You say "may be". Is it?

Mr. McAleer: Our principal purpose—

Hearing Examiner Buttle: Don't tell me "may be". Is it?

Mr. Fruchterman: That is a purpose.

Hearing Examiner Buttle: I am not going to go through all this case as to just what you may intend to do. Is it your purpose presently? You may change your mind but

is it your purpose presently to adduce meeting competition evidence?

Mr. Fruchterman: Yes, it is.

Mr. McAleer: Yes, sir.

Hearing Examiner Buttle: And you intend to adduce additional evidence connecting up this evidence on the issue of price of competitors that you are meeting?

Mr. McAleer: That is our present intention; yes, sir.

* * * * * *

1543 Hearing Examiner Buttle: I am sorry; they are here.

I will receive Respondent's Exhibits 31-A through 31-C and 32-A through 32-F in evidence subject to connection on the issue of meeting competition, which is an affirmative defense of the respondent.

I have ruled that these two Exhibits are to be received subject to connection on the issue of meeting competition, which is one of the affirmative defenses of the respondent.

Obviously discounts as indicated on these documents are in and of themselves not reflective of meeting the price. On the other hand, such evidence may be corollary to other evidence which counsel for the Respondent indicate to me they intend to adduce.

(The documents previously marked Respondent's Exhibits 31-A, B and C and 32-A, B, C, D, E and F for identification were received in evidence.)

* * * * * *

1545 By Mr. Fruchterman:

Q. How long has Universal-Rundle granted truckload discounts?

A. Ever since the existence of the company.

Q. Well, prior to the existence of the company, did the predecessors of Universal-Rundle grant truckload discounts?

A. Yes, they did.

1548 Q. Mr. Backner, are you familiar with the term "back order"?

A. Yes.

Q. What does back order mean?

A. Back order is the unshipped portion of an order. In other words, if a customer orders a certain quantity and for some reason or other the factory is unable to
1549 ship the entire quantity they make a partial shipment and the unshipped portion is called the back order.

Hearing Examiner Buttle: In other words, it is the delayed balance of an order which you couldn't deliver on time?

The Witness: Yes, sir.

By Mr. Fruchterman:

Q. In the event a back order is necessary, at what price is the back order portion shipped?

A. The back order is billed at the same price as the original order providing there has been no price drop in between the shipment of the original order and back order. If there has been a price drop the back order receives the benefit of the lower price.

1550 *Cross-Examination by Mr. Lipnick.*

Q. Mr. Backner, it is true, is it not, that there are basically three types of plumbing fixtures in terms of the material from which the fixtures are made, that is there would be cast-iron fixtures, vitreous china fixtures and steel fixtures?

A. There is also a fourth kind.

Q. What is that?

A. That is the grog body fixtures. That is an earthenware fixture which isn't vitreous china.

Q. Does Universal-Rundle manufacture all four types?

A. No, it does not.

Q. They manufacture only cast-iron and vitreous china; is that correct?

A. Yes.

Q. Are there any manufacturers of plumbing fixtures who manufacture all four types?

A. No, sir, there are not.

Q. Would your answer be the same for 1957?

A. It would be.

Q. In 1957, sir, were there any manufacturers of plumbing fixtures who manufactured cast-iron, vitreous china and steel fixtures?

A. No, sir, there were not.

1551 Q. However, there were a number of manufacturers, were there not, who manufactured both cast-iron and vitreous china fixtures?

A. That is right.

Q. And those manufacturers also purchased and resold steel fixtures, did they not?

A. That is true.

Q. American Standard did, did they not?

A. That is the thing I was trying to think about. You see with steel fixtures in 1957, if my memory serves me correctly, American Standard owned the Mullins Manufacturing Company who stamped out steel tubs for them and also enamelled them. Now, in some instances American Standard also had a steel enamelling plant on the coast and they bought steel shapes and enamelled them themselves.

Q. Well, American Standard in any event, whether they manufactured them or whether they owned the company that manufactured them or whether they purchased them,

American Standard did market vitreous china, cast-iron and steel fixtures in 1957?

A. I believe they did.

Q. And Crane did, did they not?

A. Yes, sir, they did.

Q. And Kohler?

A. No, they did not.

1552 Q. Kohler did not market all three types?

A. To the best of my recollection, in 1957 Kohler did not market a steel tub.

Q. Have you ever heard of a company named Alliance Ware?

A. Oh, yes.

Q. Do you know what business that company is engaged in?

A. Manufacturing steel plumbing fixtures.

Q. Do they manufacture steel tubs?

A. They do.

Kohler presently purchases steel tubs from Alliance. Whether they did in 1957 I don't know. I don't think they did.

Q. Are there any other manufacturers of plumbing fixtures who marketed all three types that we have been speaking about in 1957?

A. In 1957?

Q. Yes.

A. I do not believe so.

Q. Now, as a matter of fact, Mr. Backner, isn't it true that one of the reasons for the purchase by these manufacturers, including Universal-Rundle, of steel tubs and then the resale by them is so they could coordinate the color of those tubs with the color of their vitreous china fixtures and their cast-iron fixtures?

A. No, sir, it is not.

1553 Q. There is no attempt to coordinate the colors?

A. The manufacturer of steel tubs always coordinates colors with any producer of cast-iron and vitreous china he chooses to. Some manufacturers of steel tubs make fifteen or twenty different colors to match colors of other manufacturers of vitreous china and cast-iron fixtures.

Q. With respect to these short-line manufacturers you were speaking of, the mono-line people—Strike that. Is your testimony that a so-called mono-line manufacturer manufactures only vitreous china fixtures?

A. Yes.

Q. And are these any manufacturers who manufacture only cast-iron fixtures?

A. In 1957 Ingersoll-Humphries built a pottery. I think it was subsequent to 1957.

Q. You are not certain that at one time Ingersoll-Humphries did manufacture what was the manufacture of mono-line products?

A. Yes, sir.

Q. And subsequent to that they built the pottery?

A. Yes, I think it was subsequent to 1957.

Q. But they would be the only one if they were?

A. National U. S. were primarily a mono-line manufacturer of cast-iron fixtures. They also built a pottery. They built a pottery in Zanesville, Ohio. I don't know
1554 whether it was prior or subsequent to 1957.

Q. And there were also some manufacturers who manufactured only steel fixtures, isn't that so?

A. There were.

Q. Would you happen to know, Mr. Backner, whether or not—Strike that. Would you use the term "mono-line" to refer to any manufacturer who made only one type of fixture, whether it was vitreous china or cast iron or steel?

A. That is right.

Q. You would modify your original testimony as to the meaning of mono-line to that extent then, is that correct, sir?

A. The term "mono-line" today applies almost exclusively to vitreous china.

Q. Because today it just happens that most of the mono-line manufacturers make vitreous china, but if we related it back to '57 the term could apply to these others?

A. That is very true.

Q. Do you know whether or not some of these mono-line manufacturers in 1957 had arrangements with each other by which they coordinated colors and designs of fixtures?

A. Among themselves?

Q. Yes.

A. I would say no, they did not do that.

Q. You wouldn't happen to know, would you, sir, 1555 whether or not Alliance Ware and Peerless Potteries had such an arrangement in 1957?

A. Now you are associating a steel producer with a vitreous china producer.

Q. Perhaps you didn't understand my previous question. When I referred to arrangements among themselves I meant an arrangement by which a mono-line steel producer might coordinate his colors and designs with a mono-line vitreous china producer.

A. Yes.

Q. Or mono-line cast-iron producer might coordinate with a mono-line vitreous china producer.

A. They did.

Q. One of each might coordinate to make a full circle of the three?

A. That is right.

Q. It was possible?

A. They did.

Q. Is it your testimony, sir, with respect to the vitreous china fixtures produced by Universal-Rundle that Universal-Rundle produces more different models of vitreous china fixtures than any of the mono-line producers of vitreous china fixtures?

A. Yes, sir, it is.

• • • • •

1556 Q. It was not a requirement of Universal-Rundle in 1957, was it, Mr. Backner, that every wholesaler buy every item manufactured by Universal-Rundle?

A. No, sir, it was not, not every item. We made about eight-hundred items and very few of them bought the entire eight-hundred.

Q. As a matter of fact, some of your trade customers in 1957 bought only certain items, is that not so?

A. I don't know what you mean by only certain items.

Q. Well, strike that. Is it not true, sir, that some of your trade customers in Philadelphia-Camden area in the year 1957 bought only plumbing fixtures which were designed for installation in a private home?

A. I can't answer that question without going over our records.

• • • • •

1562 Q. Now, Mr. Backner, are you familiar with the circumstances surrounding the introduction by Universal-Rundle of a five-foot recessed tub which was 14-inches high?

A. Yes, sir.

Q. And in the course of your duties, in connection with supervising new product development, did you have something to do with the development of that tub?

A. Yes, sir.

Q. Was that tub developed primarily to meet certain competitive factors which were operating in the
1563 plumbing fixture market at the time?

A. Yes, sir.

Q. And was the principal factor price competition?

A. Yes, it was.

Q. And that would be price competition from other cast iron tubs?

A. That is right.

Q. And that would also be price competition from steel tubs, would it not?

A. Not to the extent that there was from cast iron tubs. If you will allow me to explain—if a man wants a cast iron tub, he won't allow a steel tub to be substituted for a cast iron tub.

Q. By the same token, aren't there some people who will go out to buy fixtures without any great preference between steel and cast iron?

A. If they are not properly educated, yes.

Q. As far as those people are concerned, the cast iron tubs are substantially higher priced than steel tubs.

A. Yes. But a cast iron 14-inch tub is also substantially lower than a steel 16-inch tub.

Q. Yes. But it is not as much higher—

A. No, that is right.

Q. —than a cast iron 16-inch tub.

A. That is very true.

1564 Q. So—

A. The price range today is about $50 for a 16-inch tub, roughly—roughly $40 for a 14-inch tub, and $30 for a steel tub, 16-inch steel tub. And of course they also make 14-inch steel tubs, which are still lower priced.

Q. And so to a certain extent prospective purchasers can compare these prices and determine just how much quality they want to pay for.

A. That is very true.

1565 Q. When you contacted your prospective customers, is it your testimony that one of the facts which you mentioned to them, to induce them to purchase from Universal-Rundle, was the stability of your company?

A. Sure.

Q. And by that, did you mean financial stability?

A. Yes. That would be part of it.

* * * * *

Q. Is it your testimony that plumbing fixtures which are in the short lines to which you referred command lower prices than plumbing fixtures which are in the broad lines?

A. Yes, sir.

Q. It would follow, would it not, that Universal-
1566 Rundle would be able to attract higher prices for its products than for products in the so-called short lines?

A. Yes, sir, generally.

Q. And when you refer to the fact that broad lines command higher prices, you referred, did you not, to inducing the purchasers by wholesalers?

A. Yes.

Q. You did not mean to imply, did you, that a homeowner would be willing to pay more for a fixture simply because it came from a broad line?

A. No.

Q. Do you recall testifying about a telephone conversation you had with Mr. Arensberg?

A. Yes, sir.

Q. Have you called on Mr. Arensberg since you had that conversation with him?

A. No.

Q. Have you spoken with him since then?

A. No, sir.

Q. To your knowledge, have any of the Universal-

Rundle employees under your supervision called on him or spoken to him since then?

A. I am not in a position to say that, Mr. Lipnick.

Q. Well, to your knowledge—

A. To my knowledge, I do not know. I have not
1567 the slightest idea.

Q. And when did you say that telephone conversation took place?

A. Shortly after we discontinued selling them.

Q. Which was, you said, in 1958 or 1959?

A. I do not recall the exact date when we discontinued selling them.

Q. Well, would you give me the best approximation that you could.

A. It may be '58 or '59.

Q. It would not be as late as 1960, then?

A. I do not believe so.

Q. It certainly would not have been in 1961.

A. Certainly it was not in 1961.

Q. And would you say with reasonable certainty that it was not within the last six months of 1960?

A. No, I am afraid I cannot give you any—

Q. You are uncertain in that area?

A. —give you any exact date on that.

Q. Well, you don't know, sir, to your knowledge whether or not he is still angry or whether he would still raise his voice to you?

A. To my own knowledge, I do not know.

Q. You do not have any idea if you were to pick up the telephone now and call him—you do not have any idea
1568 whether or not he would raise his voice, do you?

A. From his attitude when I talked to him, I do not think he would even speak to me.

Q. But you don't know.

A. I don't know.

Q. You have been angry with people in the past, have you not?

A. Oh, yes.

Q. And you sometimes have gotten over that anger in a period of a year and a half or two years?

A. Many times, that's right.

* * * * *

1569 Q. Is it your testimony, sir, that with respect to your trade customers, who were located in Philadelphia and Camden in 1957, that whenever you received a request in that year to quote a special price on a project, you did quote a special price?

A. Yes, sir — if we were sure it was a project.

Q. Well, now, then did you sometimes receive a request for a project price and refuse to quote it — refuse to quote a project price?

A. If we thought that it was not a project, yes, sir.

Q. But if you thought it was a project, you always quoted a price.

A. If we quoted a project price, a project, to a customer — who was a stocking customer of ours, who regularly

1570 bought fixtures.

Q. Who was a stocking customer?

A. Yes.

Q. Were some of your customers not stocking customers?

A. No, he wouldn't be a customer if he was not a stocking customer, if he did not have our fixtures in stock.

Q. Well, you referred, did you not, earlier to customers who picked up merchandise at your plant.

A. We considered them stocking customers, because invariably they had a few pieces of our manufacturing stock.

Q. Now, did all of your customers in Philadelphia and Camden request you to quote project prices to them in 1957?

A. I cannot answer that, Mr. Lipnick. I have no idea.

* * * * *

1571 Q. What type of customer did Sears have?

A. Well, Sears had a customer who invariably was primarily interested in price. And they were not—

Q. And is it not true, Mr. Backner, that some of your own trade customers also had customers who were primarily interested in price?

A. Perhaps—but not to the extent that Sears has, Mr. Lipnick.

Q. And that would be true, would it not, because Sears' business had a larger proportion of remodeling busi-

1572 ness in it than the business of your trade customers.

A. There is no doubt about the fact that Sears' business had a larger amount of remodeling than the trade customers. But again—

Q. And your trade customers did more of new construction, did they not?

A. That's right. Primarily I would say the trade customers sold fixtures to contractors who installed new construction, yes, whereas Sears was primarily remodeling and repairing. But that is not the reason for the preference of matching designs and things like that.

Q. Now, would you say that Mars Supply Company sold to contractors who were engaged in new construction?

A. No, sir. I would say that they would be more—

Q. They were a DTU, were they not?

A. That's right—more for remodeling and repair.

Q. They sold to consumers for remodeling and repair.

A. That's right.

Q. And is it your testimony that you know of your own knowledge that the customers of Mars Supply were less interested in price than the customers of Sears?

A. We discontinued selling to Mars Supply just for that reason, Mr. Lipnick.

Q. That the customers were interested in price?

A. Because—they wanted to buy lower priced
1573 material, and they were not able to purchase any of the better class fixtures which we wanted to sell.

Q. Would the same thing be true with respect to other customers to whom you sold in Philadelphia and Camden in 1957?

A. Yes, certainly to some of them—to the ones we discontinued selling.

Q. And that would be primarily the ones that did a very substantial DTU business, would it not?

A. That's right.

Q. As to the DTU business, the customers would be primarily interested in price, just as Sears' customers would be primarily interested in price.

A. I would say that was true.

* * * * *

1575 Q. You have no responsibility with respect to the Homart line.

A. Not as far as sales are concerned, no.

Q. But you do have—but your main—the main purpose of your employment is sales of Universal-Rundle products.

A. That's right.

* * * * *

1578 *Redirect Examination by Mr. Fruchterman.*

Q. Mr. Backner, at the present time are you selling
1579 to any trade customers who purchase only tubs from you?

A. No, sir.

Mr. Lipnick: I will object to that, your Honor. I do not see what relevance that has to this proceeding. I do not even see how that can relate to the scope of the order in this case.

Mr. Fruchterman: If your Honor, please, on cross-examination Mr. Lipnick asked almost the same question with

regard to other products—if you want to go back in the testimony.

Hearing Examiner Buttle: What is the exact language?

Mr. Frutchterman: Well, what he asked was this—

Hearing Examiner Buttle: Mr. Reporter, will you read the question?

(The Reporter read the question as follows:

"Question: Mr. Backner, at the present time are you selling to any trade customers who purchase only tubs from you?")

Hearing Examiner Buttle: Yes, I will allow it.

The Witness: No, sir, we are not.

By Mr. Fruchterman:

Q. Are you selling to any customers at the present time who purchase only lavs from you?

A. No, sir.

1580 Q. Are you selling to any customers at the present time who purchase only washdown water closets from you?

A. No, sir, we are not.

Q. Are you at the present time selling any customers who purchase only reverse traps from you?

A. No, sir.

Q. Are you able to state whether or not e[illegible]y customer in the trade line whom you are currently selling purchases at least some of each of those items mentioned?

A. Yes, sir.

Hearing Examiner Buttle: Well, wasn't it your testimony, Mr. Backner, that you were selling only to those who would handle your complete line?

The Witness: That's right, sir.

1582 *Recross Examination by Mr. Lipnick.*

Q. Mr. Backner, does every one of your customers at this time purchase every model tub you make?

A. No, sir.

Q. Does every one of your customers purchase every model lav that you make?

A. No, sir.

Q. Does every one of your customers purchase every model water closet that you make, excluding hoppers?

A. No, sir.

Q. Would your answer be the same if in addition to excluding hoppers I also included your trailerette model?

Hearing Examiner Buttle: What model?

Mr. Lipnick: Trailerette.

The Witness: No, I would say every one of our customers does not purchase a trailerette model.

By Mr. Lipnick:

Q. Now, when you stated that they all purchase at least some of each, that is tubs, lavs and water closets, would you also include kitchen sinks—did they all purchase at least some kitchen sinks?

1583 A. I would say they all purchase some kitchen sinks, yes, sir.

Q. Would it also be true that they all do not purchase every model kitchen sink?

A. That's right.

Q. Now, when you say they purchase at least some tubs and some lavs and some water closets, you did not mean to imply, did you, that they purchased the same quantity of each?

A. No, sir.

Q. In a given period?

A. I did not.

Q. As a matter of fact, they do not, do they?

A. No, they do not.

Q. Do you consider your marine fixtures to be part of your line?

A. No, sir, not when I refer to a line of plumbing fixtures, no. They are a specialty item.

Q. Now, what is in your line of plumbing fixtures?

A. Cast iron—bathtubs, lavatories, kitchen sinks. Vitreous china—closet combinations, separate closets, lavatories, urinals, basins. That is about it. We also make bidets.

Q. Does every one of your customers purchase bidets from you?

A. None of them purchase bidets, unfortunately, 1584 except those customers in Latin American countries.

Q. Does every one of your customers purchase urinals from you?

A. Yes, during the course of the year I would say that every customer had purchased a urinal from us.

Q. Do you make blow-out bowls?

A. We make blow-out bowls, yes, sir.

Q. Does every one of your customers purchase those?

A. No, sir.

Q. What is a blow-out bowl?

A. A blow-out bowl is a wall-hung bowl in which the action, contrary to being siphonic, is caused by the extreme force of water blowing the seal out of the bowl.

Q. Is that a variety of toilet?

A. That is a variety of toilet—used in commercial installations primarily.

Q. Do you make other products used primarily in commercial installations, which all of your customers do not purchase?

A. Yes, sir.

Q. Are they also considered by you to be part of your line?

A. Yes, sir.

Mr. Lipnick: No further questions.

Further Redirect Examination by Mr. Fruchterman.

Q. Mr. Backner, do you have any customers who
1585 limit their purchases from you to four and a half foot recessed tubs?

A. No, sir.

Q. Do you have any purchasers who limit their purchases from you to reverse traps?

A. No, sir.

Q. Do you have any purchasers who limit their purchases from you to one-piece water closets?

A. No, sir.

Q. Do you have any customers who limit their purchases from you to one model of kitchen sink?

A. No, sir.

Mr. Fruchterman: No further questions.

Further Recross Examination by Mr. Lipnick.

Q. Mr. Backner, do all of your customers handle Universal-Rundle products exclusively?

A. No, sir.

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1587 WALTER J. DONNELLY was thereupon called as a witness for the Respondents and, having been first duly sworn, testified as follows:

Hearing Examiner Buttle: Give your name and address to the Reporter, please.

The Witness: Walter J. Donnelly, 5811 Morris Street, Philadelphia 44, Pennsylvania.

Direct Examination by Mr. Fruchterman.

Q. Mr. Donnelly, where are you employed?

A. With the Kohler Company, in Philadelphia.

Q. What are your duties with the Kohler Company?

A. I am manager of the Philadelphia branch. That includes supervision of ten salesmen, calling on architects, engineers and plumbing fixture wholesalers in the area covered by the Philadelphia branch.

Q. What is that area, sir?

1588 A. That is South Jersey, Eastern Pennsylvania, all of Maryland, Delaware, Baltimore and Washington, and the Washington trading area of Virginia.

Q. Did you hold that position in 1957?

A. I did.

Q. Were your duties essentially the same as you have just described?

A. Exactly.

Q. Are you testifying here today pursuant to a subpoena?

A. Yes, I am.

Q. How long have you been with the Kohler Company?

A. Since 1927.

* * * * *

1601 Q. Is price an important factor in this business?

A. It is very important.

Q. Has it been so since 1957?

A. It has.

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1604 By Mr. Depro:

Q. Mr. Donnelly, who are some of your competitors in the business?

A. American Standard, Eljer, Briggs, Gerber, Universal-Rundle, Crane Company.

Q. Who are some of your wholesalers that you sell to in the Philadelphia area?

A. C. J. Rainear, Grinnell Company, Southwork Plumbing Company, William Betz, Etna Plumbing Company, Acme Plumbing Supply Company, Philadelphia Plumbing Supply, Charles Reichard, Economy Plumbing Supply, M. Schneider, Rigberg.

Q. Are they all in the Philadelphia-Camden area?

A. This is just in Philadelphia now. In Camden, we have the Central Supply of Camden and Gloucester, and then we have American Supply over there. Those two in Camden.

Q. Is Central Supply the Mignogna Brothers?

A. That is Arch Mignogna and Joe.

Q. Do you sell to Hajoca in Philadelphia?

A. We do not.

• • • • •

1607 Q. Mr. Donnelly, do you know to whom your customers resell plumbing fixtures that—your wholesale customers?

A. To whom they resell the fixtures?

Q. Yes, in a general way.

A. In a general way, they sell it to the plumbing contractors, sir.

Q. They sell to plumbing contractors?

A. That's right.

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1611 RONALD A. BROWN was thereupon called as a witness for the Respondent and, having been first duly sworn, testified as follows:

Hearing Examiner Buttle: Give your name and address to the Reporter.

The Witness: My address and my name?

Hearing Examiner Buttle: That is right.

The Witness: Ronald A. Brown, 469 Woodhill Road, Wayne, Pennsylvania.

Direct Examination by Mr. Fruchterman.

Q. Mr. Brown, would you state where you are employed? Where are you employed, sir?

A. The Eljer Plumbingware Division, Murray Corporation of America.

Q. What is your position with that company?

A. Regional Sales Manager.

Q. For what region is that?

A. That is what we call Region Number 3, involving through and including the State of Virginia and half of Pennsylvania and half of New York State, including Buffalo, New York. It doesn't include Metropolitan New York City.

1612 Q. Does it include the Camden and Philadelphia area?

A. Yes, Southern New Jersey, so-called.

* * * * *

1622 *Cross-Examination by Mr. Depro.*

1623 Q. Now, the Eljer Company in 1957 sold to plumbing wholesalers in the Camden-Philadelphia area, did it?

A. That is correct.

Q. Would you name some of those wholesalers?

A. Eddington Industrial Supply, Hamilton Plumbing Supply, Hajoca Corporation, J. Levitt Company, Val-Worth Plumbing Supply, Cobb's Supply Company, Camden Plumbing Supply, Wallace Supply, George Seipp Company, Grennel Corporation and a number of others.

Q. Did you sell to those that you have named in 1957, would you say?

A. Yes, sir, we did.

Q. And did any of those plumbing supply houses stock all of the items that the Eljer Company made in the plumbing fixture field?

A. They didn't stock all but they stocked what was marketable in their area; and in that year we maintained a company warehouse that we stocked widely of our catalogued items. We have since given it up.

Q. Do you mean in the Philadelphia-Camden area?

1624 A. Yes, we had a warehouse in Philadelphia, a company warehouse.

* * * * *

1626 Hearing Examiner Buttle: You say you lost business in 1957? What was the occasion of your losing business? Do you have any opinion in that regard as to why you did?

The Witness: Just that we felt the availability and the merchandising success of Sears, Roebuck caused us to lose business.

Hearing Examiner Buttle: Cost you what?

The Witness: Caused us to lose business. They participated to a degree in the market nationally that we were aware of.

By Mr. Depro:

Q. What factor—

Hearing Examiner Buttle: Well, did you lose business in the Philadelphia-Camden area?

1627 The Witness: Yes, we did.

Hearing Examiner Buttle: Do you have any opinion as to why you lost business aside from the fact that someone else was in the market?

The Witness: I think the display, the service and the financial time payments, all of these things have been excellent merchandising vehicles for Sears, Roebuck, and they have been successful with them in the sale of plumbing fixtures.

Hearing Examiner Buttle: Well, among those things do you include price or not?

The Witness: I would include price.

Hearing Examiner Buttle: What?

The Witness: I would include price; yes.

2626 PROCEEDINGS.

Hearing Examiner Buttle: Let the record show that we have convened in the matter of the Universal-Rundle Corporation, Docket No. 8070, at the offices of the Federal Trade Commission at 11th and Pennsylvania Avenue, Washington, D. C., on July 29th, 1963, at 2:00 p.m.

This hearing is held pursuant to a waiver of reasonable notice therefor by counsel for the respondent and counsel for the Commission; and at an informal conference we had at 9:00 a.m. this morning at the completion of the Commission's prima facie case, respondent orally made a motion to dismiss the charge of legal price discrimination with respect to the sale of plumbing fixtures sold to Sears, Roebuck and Company, relying primarily on the failure of Commission counsel to prove by substantial evidence that such fixtures are of like grade and quality as the plumbing fixtures sold under the Universal-Rundle brand.

The Hearing Examiner reserved decision on respondent's motion, pending completion of respondent's defense evidence on this issue.

By order dated April 17th, 1963, the Hearing Examiner severed the foregoing issue of like grade and quality from all other issues in this proceeding, since it then appeared that a resolving of this issue might eliminate the need for the presentment of extensive proof and a lengthy
2627 check of basic cost data by Commission's attorneys and accountants, since the respondent had interposed a defense of cost justification.

As regard this severed issue, the Hearing Examiner, after considering the evidence and proposed findings, dismisses the charges alleged in the Complaint. Complete findings thereon will be made a part of the Initial Decision.

And of course, as I have heretofore stated, this dismissal applies to the issue of like grade and quality, with regard to the particular issue that was severed, involving the sale of Universal-Rundle products to Sears, Roebuck under certain specifications provided by Sears, Roebuck.

However, generally speaking, there is a remaining issue of trade-to-trade allowances, prerequisite to resolving this case completely and rendering an initial decision.

That being the case, I think the first thing that would be appropriate would be a stipulation between counsel for the respondent and counsel for the Commission as to the remaining issue. I do want you to agree on that.

Then I think the next thing on the agenda might be for both of the parties, if they wish, to rest their case and then we will fix a date for proposed findings. I think that is the simplest way of handling it as we discussed it this morning.

Mr. McAleer: May I be heard, Mr. Buttle?

Hearing Examiner Buttle: Yes.

2628 Mr. McAleer: In Paragraph Six of the Commis-

sion's Complaint, Mr. Buttle, the Commission alleges that the alleged price discriminations on the sale of plumbing fixtures sold under the Universal-Rundle brand name violated Section 2 (a), both in the primary line and in the secondary line. I think it would be a correct statement to say that the Commission has failed to prove a prima facie case with respect to the primary line inherent to competition.

I would therefore submit that the remaining issue is the alleged price discriminations on the sale of Universal-Rundle branded fixtures to its trade customers and the secondary-line injury to completition.

If Mr. Depro, Commission counsel, would be willing to stipulate that he does not or has not made a prima facie case on the primary-line injury to competition, we in turn will stipulate that the remaining issue is the alleged price discriminations on the sale of Universal-Rundle branded fixtures, the secondary line.

Mr. Depro: Well, Mr. Examiner, I don't believe the evidence, as in the record, supports a primary-line case, either. So I would be willing to stipulate as Mr. McAleer has offered.

Hearing Examiner Buttle: Yes; so the only remaining issue I have before me is the secondary-line competition, is that it?

2629 Mr. Depro: As to the trade-against-trade sales, yes, sir.

Hearing Examiner Buttle: Well, everything else has been disposed of. I have ruled with regard to the fact that I consider that the U-R line products and the Homart line products are of like grade and quality.

Mr. McAleer: Are not of like grade and quality.

Hearing Examiner Buttle: Are not of like grade and quality.

Mr. Depro: And there is no question, I suppose, in

respect of Mr. McAleer's views as to the quality of the Rundle trade products.

Mr. McAleer: There is no question in the trade aspect of the case, on whether or not the products sold under the Universal-Rundle brand name are of like grade and quality. The Commission's evidence consists of some invoices at which the identical product was sold to the customers at different prices. So there is no issue with respect to the like grade and quality of the fixtures sold under the Universal-Rundle brand name.

Frankly speaking, at this point, Mr. Buttle, it would appear that the issue remains primarily that of whether or not the Commissioner showed a substantial effect on competition in the sale of the Universal branded fixture. If it is agreed that the remaining issue is limited to alleged
2630 price discriminations on the sale of fixtures under the Universal-Rundle brand name, limited to the secondary-line level of competition, I don't think there will be any difficulty with Mr. Depro and myself agreeing to a mutually satisfactory date for proposed findings on that issue.

I would also like to emphasize that—

Hearing Examiner Buttle: Let's stop there for the moment.

While we have the issue before us, would you stipulate that that is the remaining issue?

Mr. Depro: Yes, sir.

1 BEFORE THE FEDERAL TRADE COMMISSION.

(Caption—8070)

Room 532, Federal Trade Commission Building,
Sixth and Pennsylvania Avenue, N. W.
Washington, D. C.

April 15, 1964.

51 Mr. Lipnick: With respect to the alleged discrimination between respondent's trade customers, apparently the first issue is just how the price discrimination should be viewed. The Examiner, in his initial decision, compared specfic invoices of specific transactions and said that on such and such a date customer A paid a dollar and customer B paid two dollars and, therefore, there was a discrimination in price.

Chairman Dixon: He was not comparing, though, a price of a carload quantity with a less than carload quantity?

Mr. Lipnick: He was, in effect, comparing a per unit price, sir. The per unit price on a carload quantity was lower than the per unit price on less than carload quantity.

Chairman Dixon: That is usually the custom.

Mr. Lipnick: I am sorry, sir.

Chairman Dixon: I say that is usually customary that a per unit price of a carload quantity is less than the per unit price of a less than a carload quantity.

52 Mr. Lipnick: Well, I don't know that it is customary or usual, sir.

Commissioner Elman: It is a price discrimination?

Mr. Lipnick: Yes, indeed. Yes, indeed, sir, particularly where there is a freight factor computed into carload and less than carload purchases in addition to the truckload discount.

Respondent in their appeal brief argued that comparison of specific purchases was unrealistic, and at pages 35 to 43, they argued that a comparison of a truckload purchase made on June 13 with an individual purchase made on June 13 was unrealistic because the truckload purchasers had made, I believe it was, nine less than truckload purchases during the year beginning as early as February, and that the so-called unfavored purchaser had made a truckload purchase in September.

So, we then prepared a computation in our answering brief of the effect of truckload purchases on the prices charged taking into account all of the purchases of each item made during the year.

Respondent in their reply brief now say that for some mystical reason there needs to be a 30-day cutoff point in invoices which were prepared.

Chairman Dixon: Was there an effort on the part of Respondent to justify carload purchases as compared to less than carload quantity purchases?

53 Mr. Lipnick: No, sir. I might say in connection with the inclusion of colored and white fixtures in the same computation or answering brief, the reason is that in order to buy a truckload it was necessary to inventory the fixtures, and in interrogating a commission's witness, I believe it was Mr. Friedman, respondent's counsel asked Mr. Friedman "Now, isn't it a fact that if you wanted to inventory plumbing fixtures you would have to inventory the white pieces and all six different colored pieces all at the same time"?

And the answer was, "Yes."

If there is a requirement of buying in truckloads then we think the proper way of comparing prices is to include all of the fixtures, particular fixtures, colored and white.

In connection with the concept of availability of the discount, the purchaser who bought 30,000 dollars a year

worth of plumbing fixtures and who bought only a small fraction of that from the respondent, testified that he could not sell respondent's plumbing fixtures to his largest class of customers because they wouldn't buy them.

So, respondent still argues that this purchaser could have bought 30,000 dollars worth of fixtures from respondent but he would have taken several years to sell them. The essential point is that all of these people testified that the reason they didn't buy truckloads was because they could not move them as fast—move them fast enough. It is
54 not a question of—it is not a question, according to their testimony, of whether you can ultimately sell them. It is a question of whether you can move them out of inventory fast enough to justify tying up the space and the capital in the fixtures particularly since—

Commissioner Elman: How important is the discount?

Mr. Lipnick: Well, the evidence of these people is, the testimony of these people was, and it is uncontroverted they were engaged in intense price competition, that the only competitive factor in the market was price. That the only competitive decision they ever had to meet was whether—

Commissioner Elman: Do you have any evidence here of the sort we have had in some cases, of the importance of a two-cent spread, two per cent? Do you have anything on that?

Mr. Lipnick: We don't have evidences as to exactly what spread it would take. We do have witnesses.

Commissioner Elman: Do you have any evidence as to the margin on which these purchasers operate?

Mr. Lipnick: We do have evidence, sir, I believe most of it is cited in our answering brief, we do have evidence that some of these people testified that they always took the two per cent cash discount because that was their margin of profit. We have other witnesses who testified why did

you take the two per cent cash discount, because in our business—

55 Commissioner Elman: You say that evidence is in your brief?

Mr. Lipnick: Yes, sir.

Commissioner Elman: Where is it?

Mr. Lipnick: Beginning at page 27 of our answering brief, Mr. Commissioner. "Why did you take advantage"—

Commissioner Elman: I see it.

Mr. Lipnick: And on for several pages.

But the essential point is that even the people who were able to buy in truckloads stated that they couldn't buy slow moving items in truckloads because it was necessary to anticipate, to be able to reasonably anticipate a quick resale. A slow-moving item you might or might not have a call for. And in between truckloads they couldn't buy a truckload to get a fast-moving item because they would have to build up their inventory—

Chairman Dixon: There is no doubt of the contention of respondent that when you compared purchases on or about the same day of this same like grade and quality merchandise that you were comparing a price that was a carload quality price with a less than carload quantity price?

Mr. Lipnick: There is no doubt of that, sir.

I might say that the Examiner has found the cities of Philadelphia and Camden constitute a single market area, and I think without doubt that in a market area the

56 farther away two people get, the less quantum of competition there may be between them. But to say that there is an absence of competition, I don't think would be correct.

Commissioner Elman: Is there evidence that the same people bought, the same ultimate purchaser bought, from the, both the favored and the disfavored customers?

Mr. Lipnick: This is—I would say—

Commissioner Elman: Do they compete for the same customers, the same trade?

Mr. Lipnick: Yes, sir, I would say so, and I think most of that evidence, in fact I am sure all of that evidence, is cited in our brief.

Commissioner Elman: Whereabouts?

Mr. Lipnick: The heading of geographic competition begins on page 20, and the question of functional competition is discussed beginning at page 15 of our answering brief.

In connection with the geographical limitation proposed on the order, I would only like to say two things: that, first, respondent's argument has never acknowledged the fact that it has warehouses elsewhere than in Philadelphia. In fact, it has them from coast to coast.

Respondents have also not acknowledged the fact that these truckload discounts and less than truckload prices were granted in accordance with a nationwide pricing policy which was set by its home office in Newcastle, Pennsyl-
57 vania. That respondent's freight policy which respondent in its reply brief says was designed to eliminate or discourage less than truckload purchases, was also put into effect on a nationwide basis. It is our inference from this that the only conclusion possible is that there are truckload purchases and less than truckload purchases even where the purchasers are not located in the City of Philadelphia, Pennsylvania, and Camden, New Jersey.

If there are no further questions we will submit at this point.

Chairman Dixon: The Commission will take the matter under advisement.

VOLUME 2

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 101

FEDERAL TRADE COMMISSION, PETITIONER

vs.

UNIVERSAL-RUNDLE CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petition for certiorari filed April 15, 1966
Certiorari granted October 10, 1966

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wrc

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Summary - American Standard
Current Price Differentials Between Truckload
and Less Than Truckload Shipments

Product No.	Quantity	White	Per Cent	Colored	Per Cent
P-2185	LTL	67.88	21.18	77.60	14.64
	TL	53.50		66.25	
P-2255	LTL	53.61	16.99	57.13	14.32
	TL	44.50		48.95	
F-122	LTL	12.04	18.60	15.04	18.55
	TL	9.80		12.25	
F-321	LTL	10.22	22.70	12.78	22.54
	TL	7.90		9.90	
F-2109	LTL	29.80	16.11	37.24	16.09
	TL	25.00		31.25	
F-2120	LTL	24.91	13.69	31.14	13.62
	TL	21.50		26.90	
F-2122	LTL	24.61	20.76	30.72	20.57
	TL	19.50		24.40	
F-2124	LTL	24.61	13.65	30.72	13.57
	TL	21.25		26.55	
F-2116	LTL	23.11	22.54	28.89	22.46
	TL	17.90		22.40	
		Average	18.47	Average	17.37

Summarized from American Standard Price Sheets, (See Exhibits A - AA to Evans Affidavit)

√ Exhibit 1.

580

Summary - Elger Division of the Murray Corporation
Current Price Differentials Between Truckload
and Less Than Truckload Shipments

Product No.	Quantity	White	Per Cent	Colored	Per Cent
E-1070/75	LTL	$ 67.90		$ 77.60	
	TL	53.50	21.21	66.25	14.65
E-1120/25	LTL	67.90		77.60	
	TL	53.50	21.21	66.25	14.65
E-1180	LTL	51.80		54.60	
	TL	44.40	14.29	48.95	10.35
E-3324	LTL	10.20		12.80	
19 x 17"	TL	7.90	22.55	9.90	22.66
E-3324	LTL	12.05		15.05	
20 x 18"	TL	9.80	18.67	12.25	18.61
E-5250	LTL	24.60		30.70	
	TL	19.50	20.73	24.40	20.85
E-5254	LTL	24.60		30.70	
	TL	21.25	13.62	26.55	13.51
E-5255	LTL	29.80		37.25	
	TL	25.00	16.11	31.25	16.11
E-5270	LTL	23.10		28.90	
	TL	17.90	22.51	22.40	22.42
E-5275	LTL	23.95		29.95	
	TL	21.50	10.23	26.90	10.19
	Average		18.11		16.40

Summarized from Elger Division of the Murray Corporation Price Sheets,
(See Exhibits B - B B to Evans Affidavit)

✓ Exhibit 2

Summary - Rheem Manufacturing Co.
Current Price Differentials Between Truckload
and Less Than Truckload Shipments

Product No.	Quantity	White	Per Cent	Colored	Per Cent
225-75'	LTL	$ 67.87		$ 77.63	
	TL	57.95	14.62	66.25	14.66
232-4 5'	LTL	51.86		54.58	
	TL	44.55	14.10	46.90	14.07
847-9	LTL	12.33		13.70	
	TL	10.48	15.00	11.64	15.04
851-3	LTL	12.28		13.65	
	TL	10.44	14.98	11.60	15.01
2115-32"	LTL	21.06			
	TL	17.50	16.90		
2600	LTL	24.61		27.38	
(19 x 17)	TL	21.28	13.53	24.28	11.32
2600	LTL	27.66		30.78	
(22 x 19)	TL	23.77	14.06	27.05	12.12
G-154	LTL	12.04		15.09	
(20 x 18)	TL	9.80	18.60	12.25	18.82
G-154	LTL	10.22		12.79	
(19 x 17)	TL	7.90	22.70	9.90	22.59
G-2260-62	LTL	15.25		17.54	
	TL	12.10	20.66	13.93	20.58
G-2290-92	LTL	14.76		22.14	
(20 x 18)	TL	11.72	21.28	17.59	20.55
G-2230	LTL	29.75		37.25	
	TL	25.00	15.97	31.25	16.11
G-2210, G-2220,	LTL	24.61		30.71	
G-2240	TL	19.50	20.76	24.40	20.55
G-2300	LTL	23.11		28.89	
	TL	17.90	22.54	22.40	22.46
		Average	17.55	Average	17.22

Summarized from Rheem Manufacturing Co. Price Sheets, (See Exhibits C - CC to Evans Affidavit)

✓ Exhibit 3

582

Summary - Briggs Manufacturing - Current Price Differentials Between Truckload and Less Than Truckload Shipments

Product No.	Quantity	White	Per Cent	Colored	Per Cent
B-6421	LTL	23.00	15.22	28.70	14.98
	TL	19.50		24.40	
B-6422	LTL	23.00	7.61	28.70	7.49
	TL	21.25		26.55	
B-6423	LTL	23.00	6.52	28.70	6.24
	TL	21.50		26.90	
B-6425	LTL	27.51	9.12	34.39	9.13
	TL	25.00		31.25	
B-6432	LTL	21.59	17.13	26.98	16.91
	TL	17.90		22.40	
B-3302	LTL	9.55	17.29	11.95	17.15
	TL	7.90		9.90	
B-3312	LTL	11.23	12.73	14.08	13.00
	TL	9.80		12.25	
	Average		12.23	Average	12.13

Summarized from Briggs Price Sheets, (See Exhibits D-DD to Evans Affidavit)

Exhibit 4

Summary - Kohler Co.
Current Price Differentials Between Truckload and Less Than Truckload Shipments

Product No.	Quantity	White	Per Cent	Colored	Per Cent
K - 515 & 16	LTL	67.86	21.16	75.38	12.11
	TL	53.50		66.25	
K - 725 & 726	LTL	51.98	14.39	55.19	11.31
	TL	44.50		48.95	
K - 1746 19 X 17	LTL	10.20	21.57	12.77	22.47
	TL	8.00		9.90	
K - 1746 20 X 18	LTL	12.06	18.74	15.00	18.33
	TL	9.80		12.25	
K - 3712 EB	LTL	29.67	18.44	37.31	15.57
	TL	25.20		31.50	
K - 3712 PB	LTL	24.71	21.08	30.84	20.88
	TL	19.50		24.40	
K - 3714 PB	LTL	24.71	14.00	30.84	13.91
	TL	21.25		26.55	
K - 3716 PB	LTL	24.94	13.79	31.24	13.89
	TL	21.50		26.90	
K - 3725 PB	LTL	23.23	22.73	29.01	22.79
	TL	17.95		22.40	
		Average	18.43	Average	16.81

√Exhibit 5

Kohler
Con't.

Kohler's Wholesaler's Net Price for LTL
Discounts of 25%, 20% and 5% are applied to "List Prices"

Product No.	White	Colored
K - 515	119.05	132.25
	67.86	75.38
K - 725	91.20	95.95
	51.98	55.19
K - 1746	17.90	22.40
19 X 17	10.20	12.77
K - 1746	21.15	26.45
20 X 18	12.06	15.00
K - 3712 EB	52.05	65.45
	29.67	37.31
K - 3712 PB	43.35	54.10
	24.71	30.84
K - 3714 PB	43.35	54.10
	24.71	30.84
K - 3716 PB	43.75	54.80
	24.94	31.24
K - 3725 PB	40.47	50.90
	23.23	29.01

Prices listed on these sheets are summarized from Kohler's Price Sheets, (See paragraph 6 of Evans Affidavit and Exhibits E-EE attached thereto)

Exhibit 5

Summary - Crane Company
Current Price Differentials Between Truckload
and Less Than Truckload Shipments

Product No.	Quantity	White	Per Cent	Colored	Per Cent
1-300 20 x 18	LTL	$12.04	18.60	$15.04	18.55
	TL	9.80		12.25	
1-320 19 x 17	LTL	10.22	22.70	12.79	22.60
	TL	7.90		9.90	
3-140-10	LTL	24.91	13.69	31.14	13.65
	TL	21.50		26.90	
3-140 12"	LTL	24.67	20.96	30.82	20.51
	TL	19.50		24.50	
3-140-14	LTL	24.67	13.86	30.82	13.85
	TL	21.25		26.55	
3-141	LTL	29.80	16.11	37.24	16.09
	TL	25.00		31.25	
3-175	LTL	23.22	22.91	29.00	22.76
	TL	17.90		22.40	
2-78	LTL	67.89	21.20	77.51	14.53
	TL	53.50		66.25	
2-80	LTL	67.89	21.20	77.51	14.53
	TL	53.50		66.25	
2-100	LTL	51.87	14.21	54.60	10.37
	TL	44.50		48.95	
	Average		18.54		16.74

Summarized from Crane Co. Price Sheets, (See Exhibits F through FF to Evans Affidavit)

✓ Exhibit 6

ANSWERING INQUIRY 1314

Dun & Bradstreet ANALYTICAL Report

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134-4621 A AD I JAN 10 1964 N

AMERICAN RADIATOR & STANDARD SANITARY CORPORATION
(American-Standard)

MFG PLUMBING & HEATING FIXTURES & EQUIPMENT

40 W 40TH ST
NEW YORK 18 N Y

TEL212-0X5-5600

1899

Aa A1
Also Branches

TRADE DISC-PPT
SALES $501,144,928
WORTH $277,308,678
EMPLS 51,900

SUMMARY THIS COMPANY IS A LEADER IN ITS INDUSTRY. OPERATIONS OVER THE YEARS HAVE BEEN PROFITABLE AND A SOUND FINANCIAL CONDITION HAS BEEN MAINTAINED.

TRADE Trade reports over the years have indicated that this company has discounted its bills or met its obligations within terms and that credit is granted in substantial amounts.

BANKING Principal accounts maintained with several New York City and out-of-town banks. Company has borrowed from the banks under long term unsecured credit agreements. During November 1963 borrowed $20,000,000 due in three years. Bank comment is favorable.

ANALYSIS This company holds a position of prominence in its industry. Operations over the years have been profitable. In 1960, there was a considerable drop in the net earnings. During that year there was a slow down of home building in the United States. Intense competition for the lower amount of business available resulted in weakened prices. In 1961 there was a moderate decrease in sales which was due in part to selling the assets of the Youngstown Kitchens Division and to general industry conditions. Effects of the cost-price squeeze continue to be felt. For 1962, sales improved. However, competitive pricing was felt in the industry domestically.

The figures of December 31, 1962 show a sound financial condition. As brought out under the paragraph in the CD report concerning "Depreciation Policy" the company computed the figures in the CD report on the basis of straight-line depreciation whereas, accelerated depreciation is used for income tax purposes. The tax savings derived is credited to deferred taxes on income. During 1962, net earnings before depreciation amounted to $28,650,161. Further additions to working capital resulted from deferred taxes on income of $2,162,353 and other items amounting to $657,928. This was applied against capital expenditures of $25,141,699, dividends paid $9,401,589, investment in foreign companies $335,064 reduction in long term debt $6,260,885 and acquisition of Treasury stock $3,041,995. Total working capital applications amounted to $41,161,232 resulting in a decrease in the net working capital of $12,680,790.

CURRENT Consolidated operating results for the nine months ended September 30:

	1963	1962
Net Sales	$ 387,958,459	$ 368,330,580
Net Profit	11,498,599	8,146,559

(CONTINUED)

Exhibit 7-71

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Mbr1 0-60

CURRENT
(Cont'd)

Company reported to the New York Stock Exchange that on October 3, 1963, it reacquired 1,217,999 shares of its common stock tendered under purchase offer at $19 a share.

Company borrowed $20,000,000 from banks, due in three years, at the prime rate, with no restrictions on dividends or working capital requirements. Proceeds were used to purchase common shares under above tender offer and for other corporate purposes.

November 7, 1963, company's plumbing and heating division announced plans to close its Cook St. Brass Foundry in Cincinnatti in about fifteen months. The division also said it would modernize its Louisville, Ky. Brass Foundry.
1-10-64 (543 24) L97 2824 3A40 3824 6846 R41 (200+)

Echlin 7 by 2
588

Dun & Bradstreet Report

FINANCIAL STATEMENT

In the interest of speed financial statements are issued as received. These figures are subsequently to be reviewed in relation to rating and included in the report when revised.

34x32 134-4261 A ST 1 MAR 13 1964 N
34 33 AMERICAN RADIATOR & STANDARD SANITARY CORPORATION
35 67 (American-Standard) MFG PLUMBING & HEATING FIXTURES & EQUIPMENT
34 43
24 99 40 W 40TH ST
[illegible] 22 NEW YORK 18 N Y

AMER. RADIATOR & STAND. SAN. CORP.

Consolidated Income Account, years ended Dec. 31:

	1963	1962
Net sales	$527,537,098	$500,088,234
Other income	1,250,298	1,056,694
Total	528,787,396	501,144,928
Cost of sales	400,545,517	396,170,630
Sell. & adm. exp.	97,320,965	83,217,362
Research & dev. exp.	7,360,982	7,454,986
Depreciation	16,257,814	15,681,563
Interest	529,424	841,679
Fed. income tax	20,100,000	14,800,000
Net profit	16,674,527	13,058,598
Earn. surplus, 1-1	161,601,762	157,944,753
Preferred divs.	307,048	307,048
Common divs.	8,747,225	9,094,541
Earn. surp., 12-31	169,221,816	161,601,762
Times pfd. divs.		42.53
Earn., pfd. share	$380.14	$297.71
Earn., com. share	[1]1.64	1.13
Cash flow, com. sh.	[2]3.47	2.83
No. of pfd. shares	43,864	43,864
No. of com. shares	9,999,237	11,271,001
	[1]$1.50 on 10,940,880 aver. shs.	[2]$3.17 on aver. shs.

Note: Net sales and net income of fgn. subs. amounted to $194,373,273 and $12,497,054 in 1963 and $158,854,288 and $9,307,769 in 1962. Divs. received from fgn. subs totaled $6,995,356 in 1963 and $5,490,204 in 1962, after withholding taxes of $739,895 and $568,138 respectively.

Consolidated Balance Sheet, as of Dec. 31:

Assets:	1963	1962
Cash	$33,324,741	$28,443,001
Mkt. secur., cost	6,356,871	13,031,536
Receivables, net	70,478,925	67,760,197
[1]Finished goods	52,942,695	59,486,365
[1]Wk. in process	21,608,290	20,811,730
[1]Raw materials	22,202,681	22,167,148
[1]Supplies	8,000,301	8,686,594
Prepayments	1,741,791	1,641,262
Total current	$216,856,905	$221,356,951
[2]Net property	142,424,339	142,452,307
Inv. Brat. sub.	3,692,138	2,907,281
Def. chgs., etc.	5,191,631	6,643,590
Total	$368,165,013	$373,360,129
Liabilities:		
Accts. pay., etc.	$51,391,967	$47,537,984
Notes payable	178,500	6,231,780
Income taxes	18,709,221	15,945,220
Total current	$70,430,788	$69,714,989
Notes payable	11,944,550	13,453,075
Fgn. oper. res.	14,875,071	14,864,586
Def. income tax	3,554,723	3,542,504
Minority interest	4,515,618	4,448,378
7% pfd. stk. ($100)	4,386,400	4,386,400
Com. stock ($5)	58,549,680	58,549,680
Capital surplus	30,128,112	30,128,112
Earned surplus	169,221,916	161,601,762
Total	291,286,108	283,665,954
[3]Repcq. stock	30,442,243	6,357,276
Net stk. & surp.	260,843,865	277,308,678
Total	$368,165,013	$373,360,129
Net current assets	$146,426,117	$151,641,962
[1]Net tg. com. sh.	$25.52	$25.82
[2]Depreciation	$171,249,738	$165,730,660

[3]Incl. $45,067,862 (1962, $50,818,843) at (lifo) which is less than curr. replace. cost, other lower cost or mkt. (fifo or aver. cost). [1]After pfd. liq. val., $175 a sh. [2]1,710,689 (1962, 439,-936) com. shs. at cost.

3-13-64 (582) L97

Exhibit 7 Pg 3

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ANSWER INQUIRY -1379

Dun & Bradstreet ANALYTICAL Report

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607-3225
KOHLER CO (INC)
HIGH ST
KOHLER WIS SHEBOYGAN COUNTY
TEL414-457-4441-

A AD 32 APR 28 1964 N
MFR PLUMBING FIXTURES, ENGINES, ELECTRIC PLANTS, VALVES & FITTINGS

1873

Aa A1
Also
Spartanburg,
So Carolina

H

TRADE	DISC-PPT
SALES	$60,000,000
WORTH	$42,334,514
EMPLS	4,000 (3,500 HERE)

SUMMARY

THIS OLD ESTABLISHED COMPANY HAS BECOME ONE OF THE LEADERS IN ITS LINE. SALES FOR MANY YEARS HAVE BEEN ON A HIGH LEVEL WITH OPERATIONS PROFITABLE. A CONSISTENTLY ATTRACTIVE FINANCIAL STATEMENT HAS BEEN MAINTAINED WITH SUBSTANTIAL FIXED ASSETS HELD FREE OF ENCUMBRANCE. AMPLE WORKING CAPITAL IS AVAILABLE FOR ITS NEEDS.

TRADE

HC	OWE	P DUE	TERMS		
95000			½-10-30	Apr 6 1964 Disc	SOLD Over 3 yrs to 12-63
43800	16100		½-10-25-30	Disc	Over 3 yrs to 3-64
25000	19500		30-½-10-25	Disc	Over 3 yrs to 2-64
3000			½-Semi	Disc	Over 3 yrs to 10-63
J589	82		2-10-30	Disc	2 yrs to 2-64
Subtanl			30-½-10	Disc	Over 3 yrs to 1-64
76000	36000		30	Ppt	Over 3 yrs to 3-63
49247			1-10-30-30	Ppt	Last sale 12-63
16000	8000		30	Ppt	Over 3 yrs
8800	300		10 prox	Ppt	Over 3 yrs to 2-64
5000	1000		30	Ppt	Over 3 yrs to 2-64
3000	1000		10 prox-20 prox	Ppt	Over 3 yrs to 2-64
2543	400		30	Ppt	Over 3 yrs to 2-64
1000			30	Ppt	Over 3 yrs to 1-64
500			30	Ppt	Over 3 yrs

BANKING

Depository accounts are maintained at banks located at two Chicago, two New York, one Milwaukee and two Sheboygan; in the aggregate moderate seven figure balances are maintained. Deposits are also carried at various branch locations for minor purchase items. From the spring of 1950 up to and including 1957 no loans were used. In 1958 and in subsequent fiscal years straight note bank loans were used and regularly retired. At Dec 31 1963 all long term loans were paid but it had current borrowings at that date of $2,000,000 which have since changed to $3,000,000. Borrowings are on a straight note basis.

CURRENT

On Apr 17 1964, Walter L. Cleveland, Treasurer, declined a financial statement. Indirectly it was reported that sales in 1963 were ahead of the previous year and operations were profitable. Formerly the company had long term indebtedness but this was retired in 1963 for current operations it has used borrowings on a straight note basis which at Dec 31 1963 were $2,000,000. Outstanding bank loans at present are $3,000,000 which are used for build up of inventories during the spring months for the heavy sales during the summer months.
4-28-64 (434 226)

√ Exhibit 8 by 1

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MRe-1 (1-63)

KOHLER CO (INC)
KOHLER WIS

A CD Page 1

Company officials declined financial statements but following comparatives prepared on fiscal statements taken from out of state file records. Auditors understood to Ernst & Ernst, CPA's, Chicago, Ill.

FINANCIAL STATEMENTS

	Dec 31 1960	Dec 31 1961	Dec 31 1962
CASH	$ 3,075,791	$ 2,525,003	$ 3,837,273
MARKETABLE SECURITIES			
NOTES RECEIVABLE	194,221	196,022	218,839
ACCOUNTS RECEIVABLE	3,769,448	4,355,230	4,993,639
INVENTORY	13,154,790	12,597,736	12,622,337
OTHER CURRENT ASSETS			
TOTAL CURRENT ASSETS	20,194,250	19,673,991	21,672,088
FIXED ASSETS	30,260,089	29,532,817	29,220,865
INVESTMENTS	3,646	3,915	4,357
PREPAID—DEFERRED	674,804	598,705	852,025
Treasury Stock	6,307,530	6,326,630	6,425,041
OTHER ASSETS	1,326,902	1,227,866	903,909
TOTAL ASSETS	58,767,228	57,363,933	59,078,294
DUE BANKS	3,000,000	500,000	-
NOTES PAYABLE			
ACCOUNTS PAYABLE	2,820,798	2,924,574	4,301,587
ACCRUALS	353,733	353,720	200,000
TAXES (Except Federal Income)	)	)	)
FEDERAL INCOME TAXES	) 758,024	) 1,304,354	) 1,220,807 —
LONG TERM LIABILITIES (Current)	-	-	2,000,000
OTHER CURRENT LIABILITIES			
TOTAL CURRENT LIABILITIES	6,932,555	5,082,648	7,722,394
LONG TERM LIABILITIES	4,000,000	4,000,000	2,000,000
Def Investment Cr	-	-	446,343
RESERVES	150,000	150,000	150,000
PREFERRED STOCK	2,188,300	2,188,300	2,188,300
COMMON STOCK	20,000,000	20,000,000	20,000,000
CAPITAL SURPLUS			
EARNED SURPLUS	25,496,372	25,942,983	26,571,255
NET WORTH (Prop or Part)			
TOTAL LIABILITIES	58,767,228	57,363,933	59,078,294
NET WORKING CAPITAL	13,261,695	14,591,343	13,949,694
CURRENT RATIO	2.91	3.87	2.80
SIBLE NET WORTH	41,377,142	41,804,653	42,334,514
USED: D-DEFICIT, L-LOSS			

Inventories valued at the lower of cost or market. Receivables shown less reserve for doubtful accounts over $300,000; fixed assets shown at cost less reserve for depreciation which is estimated in excess of $15,000,000. Fire insurance on buildings and contents over $30,000,000; co-insurance of reproductive cash values. No contingent liabilities.
12-2-63

(CONTINUED)

Exhibit 8 pg 2
591

KOHLER CO (INC)
KOHLER WIS

A CD Page 2

ANALYSIS This organization has become one of the leaders in the plumbing fixture line with a clear record dating back to 1873. In addition to plumbing ...tures, the company manufactures engines which are used by manufacturers of cultivators and lawn mowers; electric and generator plants; precision and control valves and fittings. The products have been kept in line with the most modern designs and the plant facilities have been kept up to date. With heavy demand arising from the high rate of building construction and expansion of the national economy, sales have been estimated at over $60,000,000 annually.

This company has operated successfully for many years and through retention of a portion of the earnings tangible net worth moved upward. To provide for the increased sales and for lower operating costs the company has added and improved its fixed assets through additional buildings and modernization programs of new machinery and equipment. From December 31, 1947 until December 31, 1957 the net fixed assets increased about $20,000,000 and they were financed entirely out of earnings. In 1956 construction was started on a new 500,000 square foot plant at Spartanburg, So. Carolina on a 250 acre tract. The cost of this plant was in excess of $7,000,000; makes vitreous china plumbing fixtures and the new location has access to some of the major markets with savings in freight costs. It also remodeled the plant at Kohler, Wis. at cost of about $1,500,000 for vitreous china plumbing fixture line. The fixed asset expansion at the time was financed out of earnings and net working capital.

In 1960 the company completed at Kohler, Wis. a building containing 500,000 square feet for its engine and electric plant production. These facilities were transferred from one of its former plants which is now used for warehouse purposes. The cost of the new building was approximately $5,000,000. In 1960 it also started erection of a pattern plant building containing 108,000 square feet of floor space which was completed in 1961. In fiscal 1962 fixed assets were mainly through replacement of additional machinery and equipment and expenditures were moderately less than provisions for depreciation. To finance the fixed asset expansion in 1959 the company procured long term borrowings of $4,000,000 of which $2,000,000 is payable in 1963 and $2,000,000 in 1964. The long term borrowings kept the net working capital at a favorable level.

Production is quite steady throughout the year with inventories built up during the first six months of the year for heavy plumbing shipments during the summer and fall months. Inventories are well proportioned in relation to net working capital. Trading assets turn actively and with the aid of seasonal straight note bank loans, ample funds are made available for the discount or prompt retirement of trade bills.
12-2-63

(CONTINUED)

Exhibit 8 pg 3
592

KOHLER CO. (INC)
KOHLER WIS

A CD Page 3

MANAGEMENT Herbert V. Kohler, Chrm of Brd
J. Leslie Kuplic, Pres
John M. Kohler, V Pres
Walter L. Cleveland, Treas
John A. Ehren, Asst Treas
Lyman C. Conger, V Chr of Brd & V Pres
Lucius P. Chase, V Pres
Gerard A. Desmond, Sec
Edward J. Hammer, Asst Sec
DIRECTORS: Lucius P. Chase, Walter L. Cleveland, Lyman C. Conger, Gerard A. Desmond, Norman R. Held, Mrs. Dorothy Dings Kohler, Herbert V. Kohler, John M. Kohler, J. Leslie Kuplic and Edgar J. Pohland.

HISTORY Incorporated: Founded 1873 by John Michael Kohler at Sheboygan, Wis.; incorporated Wisconsin laws January 17, 1887 as Kohler, Hayssen & Stehn Mfg Co. In 1898 plant opened at Kohler, Wis.; 1901 name changed to J. M. Kohler Sons Co.; also headquarters moved to Kohler; January 10, 1903 name changed to Kohler Co. Original capital $75,000 and various changes of increased capitalization followed. Authorized Capital Stock: 40,000 shares 4% cumulative preferred par value $100 ($4,000,000) and 200,000 shares common no par value stock.
Outstanding Capital Stock: At December 31, 1962 21,883 shares preferred ($2,188,300) and 200,000 shares common at stated value $20,000,000 less treasury stock $6,425,041.
Control: This is a close corporation with control vested in the officers and directors.

Herbert V. Kohler, native born 1891, widower, son of founder, John Michael Kohler. Graduate Sheffield Scientific School, Yale University in 1914 and since active full time with the company. 1937 became President and 1940 also Chairman of Board but relinquished the Presidency in 1962 but continued as Chairman of the Board and chief executive officer. During World War I served with the A.E.F. in France as Captain of Field Artillery.

Lyman C. Conger has been active with the company since 1920; elected Assistant Secretary 1947 and 1958 Vice President. Is an attorney and attends to legal matters for the corporation.

J. Leslie Kuplic born September 23, 1911 in Manitowoc, Wis., married. Is an alumnus of Beloit College. In 1943 came with Kohler Co. in the torpedo tube department; was in time study department; 1953 became superintendent of shell department; later in charge of pottery and manufacture of engine and electric plants; a director November 30, 1950; 1961 Vice President in charge of production and July, 1962 President.

Lucius P. Chase born January 1, 1902, started with the company August 16, 1926. Was Colonel in Infantry, U.S Army, World War II. Has been in the legal department; was a director and elected a vice president November 30, 1960.

John M. Kohler born 1902, married, son of late Walter J. Kohler. Duties are administrative. Director Security First National Bank, Sheboygan.

Gerard A. Desmond born July 28, 1912, married. Started with company 1944 and was in legal department; 1958 assistant secretary and November 30, 1960 Secretary.

Walter L. Cleveland born 1916, married. Graduate University of Wisconsin. Is a CPA. 1946-1952 employed by Ernst & Ernst. 1953-1958 controller Bucyrus-Erie Co., South Milwaukee, Wis. 1959 came with Kohler Co. as controller and 1963 elected a Treasurer and a director.

Edward J. Hammer, born April 8, 1924, married. On June 23, 1952 started with the company in accounting capacities and December 19, 1959 elected Assistant Secretary and in 1962 a director. John A. Ehren aged about 60 and employed in accounting department most of commercial life; 1958 Assistant Treasurer.
12-2-63

(CONTINUED)

I Exhibit 8 by 4 593

HISTORY (Cont'd) Norman R. Held was elected a director in 1963. He is manager of plumbing sales. Mrs. Dorothy Dings Kohler widow of the late Carl G. Kohler was elected a director in 1960. Edgar J. Pohland elected a ector in 1962; he is in charge of purchases.

A former sales subsidiary, Mountain States Supply Co., Salt Lake City, Utah, was sold to others in July, 1956.

FIRE RECORD In 1900 plant was destroyed by fire with damage of approximately $75,000 which was covered by insurance. Business prior to its incorporation also sustained a fire damage in 1880. Various small fire damages in subsequent years.

OPERATION Manufactures enameled cast iron and vitreous china plumbing fixtures, brass plumbing fixtures, electric plants, industrial engines one, two and four cylinders, and precision valves and fittings.

Distribution: Through jobbers and dealers; normal market is largely residential buildings, modernizing apartments, hotels and hospitals. Electric light plants as stand-by electric equipment; engines for lawn mower and other small motor purposes.
Territory: United States; and foreign to Greece, Turkey, Central and South America and Far East.
Accounts: 2,500.
Terms: 2-15th prox. Foreign sales on letters of credit.
Seasons: Production fairly even throughout the year with inventory build up during the first six months for heavy plumbing sales during the summer and fall months.
Salesmen: About 110 and work out of various branch sales offices and act more in capacity of assistants to architects and contractors.
Employees: 4,000 of which about 3,500 are at Kohler, Wis.

Facilities: Owns a group of modern buildings brick reinforced concrete-steel construction. It has foundries, machine shops, enameling plants, pottery, brass plant, warehouses and offices. Buildings cover over 60 acres of ground. Railroad facilities C & N W R.R.

Branch Plant: During the latter part of 1958 occupied a newly completed owned plant at Spartanburg, S. C. Plant contains about 500,000 square feet and is on a 250 acre tract. It produces vitreous china plumbing fixtures.

Branch Sales Offices maintained at:

Boston, Mass	Los Angeles, Calif	Richmond, Va.
Chicago, Ill.	Milwaukee, Wis	St. Louis, Mo
Cleveland, Ohio	Minneapolis, Minn	San Francisco, Calif
Detroit, Mich	Newark, N.J.	Seattle, Wash.
Houston, Tex.	New York City, N.Y.	Washington, D.C.
Kansas City, Mo.	Philadelphia, Pa.	

Showrooms are maintained at all branches except Houston, Richmond and Washington, where only sales offices are maintained. Owns warehouse-Newark, N.J.
12-2-63 (434 226) (110)

Exhibit 8 Pg. 5

594

ANTHONY INQUIRY 1/59M

Dun & Bradstreet ANALYTICAL Report

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146-8347 — A - AD 1 FEB 20 1964 N

MURRAY CORPORATION OF AMERICA, THE — MFG PLUMBING WARES & FABRICATED METAL PRODUCTS & ASSEMBLIES — TEL212-C05-2780 — 1926 — Aa A1 Also Branches

INQUIRY
00 FIFTH AVE
NEW YORK 20 N Y

H
N

TRADE — DISC-PPT
SALES- — $36,491,965
WORTH- — $49,323,725
EMPLS — 1800 (20 HERE)

SUMMARY THIS IS A WELL ESTABLISHED COMPANY UNDER EXPERIENCED MANAGEMENT. CONSOLIDATED PROFITS INCREASED IN 1963. SALES SHOWED A SIZABLE DECLINED. HOWEVER, THIS WAS DUE TO THE DISCONTINUANCE OF TWO LESS PROFITABLE DIVISIONAL OPERATIONS. CONDITION WAS SOUND AND NET WORKING CAPITAL AND NET WORTH BOTH INCREASED IN FISCAL 1963. BANK AND TRADE RELATIONS FAVORABLE.

TRADE

HC Ex	ONE	P DUE	TERMS	Dec 31 1963	SOLD
100000			30-1/-10	Disc	
33000			30-1/-10	Disc	Over 3 yrs
7000			30-1/-10	Disc	Over 3 yrs to 9-63
4000			30-1/-10	Disc	Over 3 yrs to 3-63
3000	1000		1-10-30	Disc	Over 3 yrs
23248			10th-Prox	Ppt	Over 3 yrs
18330	18330			Ppt	
11000	6700		15th-Prox	Ppt	Over 3 yrs
5000			30	Ppt	Over 3 yrs to 3-63
100			30	Ppt	Over 3 yrs to 6-63

BANKING Account maintained at three local and five out of town banks where aggregate balances are in substantial proportions. All accounts are routine; no borrowings utilized.

CURRENT Management's representative refers to published information as being the latest released. The company has released the following income figures for the quarter ended November 30th:

Quarter Ended	Net Sales	Net Income
Nov. 30, 1963	$ 8,015,116	$ 523,554
Nov. 30, 1962	11,216,422	278,110

The above figures continue to reflect increased earnings on lower sales. This is primarily due to the discontinuance of two divisions, The Triplex Division and the Easy Division during 1962 and 1963 respectively. Both of these divisions were less profitable than others and the closing of the two divisional operations has resulted in increased earnings on lower sales.

Bank and trade relations continue favorable.
2-20-64 (971 60) L 06 13A42 5A1 1383 (153)

Exhibit 94-1

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BORG-WARNER CORPORATION OF AMERICA, THE
NEW YORK 20, N. Y.

A CD Page 1

The following figures were prepared from balance sheets contained in Annual Reports to Stockholders. Accountants: Arthur Young & Co., C.P.A.'s, New York, N. Y.

FINANCIAL STATEMENTS

	Aug 31 1961	Aug 31 1962	Aug 31 1963
Cash	$ 9,580,395	$13,356,645	$19,270,929
Marketable Securities	2,980,691	2,250,807	8,433,508
Accounts Receivable	7,280,583	8,410,141	4,797,261
Inventory (Lower of Cost or Market)	13,746,432	10,621,498	6,312,843
Income Tax Refund	592,319		
TOTAL CURRENT ASSETS	35,140,631	34,639,091	38,854,541
Fixed Assets	17,402,285	14,973,591	11,360,194
Investments	(B) 208,325	(C) 28,348	(C) 91,171
Prepaid-Deferred	457,836	329,061	175,114
Tools & Dies	575,196	625,338	448,147
Other Assets		1,835,530	1,587,292
TOTAL ASSETS	52,790,273	52,430,959	52,716,459
Accounts Payable	1,945,690	1,774,983	1,165,306
Accruals	1,526,587	1,661,122	1,463,861
Taxes (Except Fed. Inc.)	580,581		
Federal Income Taxes		457,721	315,422
TOTAL CURRENT LIABILITIES	4,052,858	3,893,826	2,944,587
Common Stock	10,122,000	9,311,000	9,354,000
Capital Surplus	6,675,685	5,264,568	5,329,730
Earned Surplus	32,938,730	33,961,565	35,088,142
TOTAL LIABILITIES	52,790,273	52,430,959	52,716,459
NET WORTH (Tangible)	$ 49,093,773 (A)	30,745,265	35,909,954
Earnings Per Share	8.67	8.08	13.16
Working Capital	49,182,221	47,911,795	49,323,725
Res. for Depreciation		15,010,504	14,683,458
Res. for Bad Debts		432,500	227,646

(A) Intangibles - Excluded in computing Tangible net worth. (C) Includes miscellaneous notes and accounts receivable. Marketable securities represent U.S. Government securities at cost. Accounts receivable are listed net less reserves of $227,845. Basis of inventory valuation lower of cost or market on first-in, first-out bases. Inventory is comprised of Finished Goods $3,174,349; Work in Process and Materials (Raw) $2,645,038 and Manufacturing Supplies $492,456. Fixed assets are listed net less reserves for depreciation of $14,683,458. No contingent liabilities reported.
2-20-64

(CONTINUED)

596 February 64 2

MURRAY CORPORATION OF AMERICA, THE
NEW YORK 20 N Y

A CD Page 2

INCOME STATEMENTS AND SURPLUS RECONCILIATIONS

FOR THE YEARS ENDED		Aug 31 1961	Aug 31 1962	Aug 31 1963
Net Sales		$42,828,307	$48,078,651	$36,491,965
Cost of Goods Sold		36,449,707	40,306,690	29,777,502
Gross Profit		6,378,600	7,771,961	6,714,463
Expenses		8,515,034	7,108,959	4,990,621
Net Income on Sales	(L)	2,136,434	663,002	1,723,842
Other Income		261,879	359,833	576,257
Special Charges		2,976,053		
Federal Income Taxes	(CR)	(536,314)		390,000
FINAL NET INCOME	(L)	4,314,294	1,022,835	1,910,099
SURPLUS - START		37,253,024	32,938,730	33,961,565
Add: Net Income			1,022,835	1,910,099
Deduct: Net Loss Adjustments		4,214,394		783,522
SURPLUS - END		32,938,730	33,961,565	35,088,142

(L) Loss. (CR) Credit.

ANALYSIS The above figures showed a consolidated financial position of the company and its two wholly-owned subsidiaries at each of the above statement dates.

The August 31, 1963 financial statement reflects increased earnings on decreased sales. The decline in volume resulted from the closing of the Triple-X Division in May of 1962 and the sale of the Easy Division in January 1963. Both of the discontinued divisions were operating at losses in recent years. Net working capital and net worth both increased in 1963.

The statement shows the maintenance of a sound financial condition with cash balances at $19,270,929 more than adequate to cover total liabilities of $2,944,587.

In the above balance sheets, other assets 1962 and 1963 represent the remaining net assets of the Divisions being liquidated at estimated net realizable value. The capital surplus account increased $65,162 in 1963 representing the excess ($137,626) of sales price over par value of $7,900 Treasury shares sold, less the excess ($72,464) of purchase price over par value of 3,600 shares of common stock acquired for the Treasury. In 1962 capital surplus decreased $1,411,117 due to the purchase of 31,200 shares.

Subsequent to statement date the Board of Directors has approved a plan of cash distribution and recapitalization which provides for payment of $14 per share to stockholders which would approximate $13,100,000, a reduction in par value of common stock from $10 to $7.50 per share and a corresponding reduction in stockholders equity. This plan was presented to and approved by stockholders at the company's annual meeting in December, 1963. An initial dividend of 25¢ per share declared on $7.50 par value common stock was payable January 15, 1964 to stockholders of record as of December 31, 1963.

-20-64

(CONTINUED)

597 Exhibit 9 Pg 3

597

Dun & Bradstreet ANALYTICAL Report

SIC | NAME & ADDRESS | STARTED | RATING UNCHANGED

34x94 34 32 35 85 '0 74
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128-0726
CRANE CO (INC)

300 PARK AVE
NEW YORK 22 N Y

A AD I JUNE 8 1964 N
MFG & WHOL VALVES FITTINGS FABRICATED PIPE PLUMBING FIXTURES HEATING & AIR CONDITIONING EQUIPMENT FLOW CONTROL & WATER TREATMENT SYSTEMS
TEL212-PL2-3600

L959 Aa A1
Also Branches

TRADE DISC-PPT
SALES- $337,365,571
WORTH- $129,792,742
EMPLS 19,429

SUMMARY THIS COMPANY HOLDS A PROMINENT POSITION IN ITS INDUSTRY. SALES AND EARNINGS BOTH INCREASED IN 1963 OVER THE PRIOR YEAR. A SOUND FINANCIAL CONDITION IS MAINTAINED.

TRADE Trade reports over the years have indicated that this company has discounted its bills or met its obligations within terms and that credit is granted in substantial amounts.

BANKING Accounts are maintained with approximately 200 banks, the most important of which are located in New York City and Chicago, Illinois. Aggregate balances are substantial. In February, 1963, 16 banks entered into a seven year unsecured $35,000,000 credit agreement. Loans have been utilized and satisfactorily handled.

CHANGES Donald R. De Veaux, Charles E. Eble and Leonard G. Dore have been elected Vice Presidents and Norman Pacun was elected Secretary and general counsel, succeeds F. L. Luce.

De Veaux-is a graduate of Princeton University, 1949 B.S. in Engineering Degree. Served in United States Navy. Is a member of the American Society of Civil Engineers. Before joining Crane Co., was with Esso Standard Oil at Linden, N.J. He was supervisor of the operations of Crane Engineers Products Group which includes Cochrane Division of Philadelphia, Pennsylvania, the Deming Division of Salem, Ohio, the Midwest Piping Division of St. Louis, Missouri, Swartout Division of Hooksett, New Hampshire and the Chapman Valve Division at Indian Orchard, Massachusetts.

Eble, born 1923. Formerly employed in the sales department of Midwest Piping Co. Inc., which was acquired by the subject in 1961.

Dore has been with Crane Ltd. since 1949 and previously was Controller of Crane Ltd., England. In addition to new position, he will serve as Deputy Chairman of the English subsidiary.

Pacun, formerly was Assistant Secretary and assistant general counsel. Born 1931 graduate of Harvard University, LL.B. Admitted to New York Bar in 1959. He was assistant secretary and assistant general counsel for the company, elected Secretary in 1964.

Lewis T. Seiler was elected a director, succeeds Robert Heller, who has retired. Seiler is President of Associated Dry Goods Corporation.

ANALYSIS This company holds a prominent position in its field. The business was started over a century ago with present management acquiring control in 1959, since the latter time, a number of changes have been made. Certain

6-8-64 (CONTINUED)

Exhibit 10 pg 1

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598

ANALYSIS (cont'd)

departments or subsidiaries which had not been profitable were discontinued or sold, part of the distribution system of the company controlled warehouses were sold, coverage in those areas now being handled through independent distributors. Companies in related lines have been acquired and some operations have been removed from high cost facilities and consolidated at other plants. Specific figures have not been made available, but the company is understood to realize approximately $5,000,000 from the businesses or assets sold whereas businesses acquired and new facilities constructed have been at a cost of close to $50,000,000. During 1959 the company purchased and retired the remaining $17,176,000 of outstanding debentures and in recent years the company has made purchases of its outstanding common and preferred stock. During 1963, the company acquired 96,550 shares of its common stock at a cost of $5,159,000 and issued 3,700 shares under option agreements for consideration of $142,000, resulting in a net decrease of 92,850 shares outstanding. During the year, 6,680 shares of preferred stock were acquired at a total cost of $559,000. To finance the expansion and acquisition program the company formerly had a $45,000,000 long term line of bank credit available. A new agreement provides for a $35,000,000 nine year line of bank credit and was entered into on February 20, 1963, replacing the previous bank term loan outstanding at that date in the amount of $28,700,000.

The figures of December 31, 1963, contained in the ST report, continue to show a sound financial condition. The item "Investments" consisted of investment in foreign Dutch affiliate, cost of $1,497,382; investment in a Spanish subsidiary not consolidated carried at $2,100,400; mortgage notes receivable $929,748 and other investments at cost of $425,958.

Late in 1963, the company acquired an 88% interest in Fundiciones Ituarte, S.A., a valve manufacturing company operating in Bilbao, Spain. This controlled company has approximately 500 employees and has 7 branch warehouses throughout Spain.

Long Term Debt:	1963	1962
Bank loan, payable $875,000 quarterly through May 1, 1971 and $1,750,000 quarterly from August 1, 1971 through May 1, 1972 plus interest, currently at 4 3/4%	$ 29,750,000	$ 23,305,000
Miscellaneous-payable by foreign subsidiaries	1,536,587	866,159
	31,286,587	24,171,159

CURRENT

Operating results for the three months ended:

	1964	1963
Net Sales	$ 83,364,000	$ 76,696,000
Net Earnings	1,076,000	653,000

6-8-64 (543 033) L97 (508)

V Exhibit 16 Pg 2

595

Dun & Bradstreet Report

FINANCIAL STATEMENT

In the interest of speed financial statements are issued as received. These figures are subsequently to be reviewed in relation to rating and included in the report when revised.

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128-0726
CRANE CO. (INC.)

300 PARK AVE
NEW YORK 22 N Y

A ST I APR 9 1964 N
MFG & WHOL VALVES FITTINGS, FABRICATED PIPE PLUMBING FIXTURES HEATING & AIR CONDITIONING EQUIPMENT FLOW CONTROL & WATER TREATMENT SYSTEMS

CRANE CO.

Consolidated Income Account, years ended Dec. 31:

	1963	1962
Net sales	$337,265,571	$333,766,863
Cost of exps.	317,258,528	317,843,714
Depreciation	7,406,845	8,383,194
Operating profit	12,600,168	7,739,953
Asset disp., net	cr 32,350	cr 401,935
Other income	98,366	440,758
Total income	12,431,004	8,582,646
Interest (net)	1,927,430	1,834,574
Income taxes	6,256,228	3,732,660
Net income	5,447,378	3,094,032
Earn. surplus, 1-1	91,491,293	96,085,733
Preferred divs.	334,430	348,168
Common divs.	2,486,380	2,471,840
Disct. pfd. stock	cr 109,419	cr 171,891
Com. stock prem.	2,856,428	3,440,255
Prov. fgn. contlng.		2,500,000
Earn. surplus 12-31	[1]91,540,842	91,491,293
Times p/d. divs.	16.79	9.17
Earn., pfd. share	$64.53	$33.06
Earn., com. share	4.35	2.21
Cash flow, com. sh.	10.68	8.73
No. of pfd. shares	84,413	91,093
No. of com. shares	1,192,430	1,285,270

[1]$26,346,834 unrestricted.

Consolidated Balance Sheet, as of Dec. 31:

Assets:	1963	1962
Cash	$13,946,934	$18,015,180
Receivables, net	46,559,183	44,508,407
[1]Raw mater., etc.	9,538,259	9,278,426
[1]Wk. in process	27,134,304	24,908,554
[1]Finished goods	34,579,730	30,311,743
Total current	$131,858,512	$127,002,569
Land	5,751,892	5,953,328
Bldgs. & improv.	54,891,404	54,976,222
Mach. & equip.	108,515,546	100,582,555
Total	[2]169,908,842	161,562,105
Depreciation	103,694,263	85,787,829
Net property	65,304,479	65,864,276
Investments	4,953,098	2,828,402
Deferred charges	991,580	1,682,367
Total	$201,108,069	$197,977,614
Liabilities:		
Accounts payable	$15,896,627	$11,726,000
Accruals	9,331,201	9,868,316
Income taxes	4,853,082	9,245,387
Bank loan due	8,308,549	12,586,127
Total current	$38,389,379	$39,376,490
Bank loan, etc.	31,286,587	34,171,159
Fgn. contlng. res.	482,152	482,152
Minority interest	1,166,209	1,215,370
3½% pfd. ($100)	8,441,300	9,109,300
Com. stock ($333⅓)	39,810,560	39,131,750
Earned surplus	91,540,842	91,491,293
Total	$201,108,069	$197,977,614
Net current assets	$93,469,133	$87,626,079
Net tang. cons.	$101.77	$96.18

[1]$23,530,340 (1963) ($25,633,013) (lifo) in U. S. other lower cost or mkt.

Exhibit 10 pg 3

4-9-64 (582) L97

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999-5 (58582)

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Dun & Bradstreet Report

SPECIAL NOTICE

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537-9300 A SN 13 MAY 7 1964 N
BRIGGS MANUFACTURING COMPANY (INC) MFG PORCELAINIZED STEEL & VITREOUS CHINA PLUMBINGS WARE & BRASS FITTINGS 1909 Aa 1½ Also Branchos

6600 E 15 MILE RD
(STERLING TWP) WARREN MICH

COMMENT ON FIRST QUARTER OPERATING RESULTS

Milton J. Stevens, chairman of the board, speaking at the annual meeting of stockholders May 5, 1964 stated that the company's sales in the first three months of 1964 were 25% ahead of the year ago. He said he had "no idea" what the company earned in the quarter or whether there was a profit or loss. In the first quarter of 1963 Briggs reported sales of $4,651,299 and a net loss of $114,815.

Of the 1,076,834 shares of stock outstanding, 353,274 shares are owned by Republic-Transcon Industries Inc., giving that company working control. According to the Briggs proxy statement, there are a number of transactions and agreements between Briggs and Republic-Transcon involving the purchase and lease of property. In addition, each company distributes the other products. Briggs distributes heating and cooling equipment made by Republic-Transcon, and that company distributes plumbing ware made by Briggs.

Stevens said that, since he had obtained control of Briggs about a year ago he had instituted sweeping measures aimed at efficiency and cost-control.

The entire management slate was elected.
5-7-64 (311 759) 18E

Exhibit 11 pg 1

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Dun & Bradstreet Report

FINANCIAL STATEMENT

In the interest of speed financial statements are issued as received. These figures are subsequently to be reviewed in relation to rating and included in the report when revised.

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537-9300
BRIGGS MANUFACTURING COMPANY (INC)
6600 E 15 MILE RD
(STERLING TWP) WARREN MICH

A ST 13 APR 22 1964 N
MFG PORCELAINIZED STEEL & VITREOUS CHINA PLUMBINGS WARE & BRASS FITTINGS

CONSOLIDATED FINANCIAL STATEMENTS

		Dec 31 1962		Dec 31 1963
Cash		$ 169,474		$ 552,699
Accounts Receivable	(P1)	2,008,531	(P1)	3,474,841
Inventory		2,860,175		5,052,985
TOTAL CURRENT ASSETS		5,038,180		9,080,525
Fixed Assets	(P2)	9,349,222	(P2)	9,265,840
Prepaid-Deferred		397,393		690,362
TOTAL ASSETS		14,784,795		19,036,727
Due Banks	(PS1)	345,000	(S1)	2,400,000
Accounts Payable		715,436		2,508,885
Accruals		688,244		769,315
Taxes		505,366		599,159
Long Term Liabilities	(S2)	347,354	(S2)	300,000
TOTAL CURRENT LIABILITIES		2,601,400		6,577,359
Long Term Liabilities	(S2)	1,568,323	(S2)	1,150,000
COMMON STOCK		3,775,919		3,775,919
EARNED SURPLUS		6,839,153		7,533,449
TOTAL LIABILITIES		14,784,795		19,036,727
NET WORKING CAPITAL		2,436,780		2,503,166
CURRENT RATIO		1.93		1.38
TANGIBLE NET WORTH		10,615,072		11,309,368

(P) Pledged to Secure (S). (P1) Pledged to Secure (S1). (P2) Pledged to Secure (S2).

Foregoing figures prepared from copies of the printed annual report to stockholders. Outside auditors Price Waterhouse & Company, C. P. A.'s, Detroit, Michigan. Inventories valued at lower of cost or market. Accounts receivable net after an unstated allowance for doubtful accounts. Fixed assets net after depreciation reserve of $9,088,608. Contingent liability: A dealer who previously purchased scrap metal pursuant to a written contract with the company, has commenced suit alleging that such contract was for an indefinite period and claiming damages in the amount of $4 million for the alleged wrongful termination of such contract in July, 1963. In the opinion of legal counsel, based upon facts supplied by the officers of the Corporation, there exist several legal defenses to this claim, including the defense that said contract was terminable by the Corporation, which defenses would constitute a complete bar to any recovery by the plaintiff.

(CONTINUED)

Exhibit 11 Pg 2

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9368-5 (19635)

BRIGGS MANUFACTURING COMPANY (INC)
WARREN MICH

A ST Page 2

INCOME STATEMENTS AND SURPLUS OR NET WORTH RECONCILIATIONS

	Dec 31 1962	Dec 31 1963
Net Sales	$19,341,373	$22,601,955
Cost of Goods Sold	17,792,065	18,577,430
Gross Profit	1,549,308	4,024,525
Expenses	2,180,723	3,411,805
Depreciation	599,292	452,269
Net Income on Sales	(L) 1,230,707	160,451
Other Income	34,949	136,503
Final Net Income	(L) 1,195,758	296,954
Surplus or Net Worth Start	8,034,911	6,839,153
Net Income	---	296,954
Adjustments	---	397,342
Net Loss	1,195,758	---
Surplus or Net Worth End	6,839,153	7,533,449

(L) Loss.

NOTES TO FINANCIAL STATEMENTS

(1) REPUBLIC-TRANSCON INDUSTRIES, INC: As of December 31, 1963, Republic-Transcon Industries, Inc. (RTI) owned approximately 33% of the outstanding common stock of Briggs Manufacturing Company, which may be deemed to be an affiliate of RTI.

In 1963 net sales included sales of approximately $375,000 to RTI and manufacturing costs included approximately $943,000 of purchases from RTI, substantially all of which have been sold.

Accounts receivable and accounts payable included at December 31, 1963, $415,880 and $424,566, respectively, with affiliates which amounts have been paid in full.

(2) CHANGES IN ACCOUNTING PRINCIPLES: Changes in accounting principles which affect comparability of the 1963 financial statements with those of the prior year and had the effect of increasing 1963 net income approximately $536,000 were as follows:

	Resulting increase in income
(a) All components of a certain grade of product were included in inventory at December 31, 1963 whereas only minor components were included at December 31, 1962.....	$ 175,000
(b) Effective January 1, 1963, the company in determining depreciation on certain fixed assets extended the useful lives as estimated by independent appraisers.....	145,000
(c) Certain costs of secondary betterments and renewals previously charged to income as incurred were capitalized in 1963....	64,000
(d) Estimated development and planning costs relating to new products and additional production facilities, which being insignificant were previously charged to income as incurred, were treated as a deferred charges as at December 31, 1963 to be amortized to income over approximately three years..	50,000

-22-64

(CONTINUED)

Exhibit III Ag 3
603

NOTES TO FINANCIAL STATEMENTS (Cont'd)

(e) Other changes in accounting principles which individually were less than approximately $35,000.....	$ 102,000
Total	536,000

(3) PENSION PLANS: The gain of $397,342 realized in 1963 on the sale of pension trust fund securities is shown as a special credit and for comparative purposes a similar gain of $158,205 in 1962 previously credited to income has been restated as a special credit. Proceeds equivalent to these gains have been applied in payment of accrued pension liabilities except for approximately $69,000 in 1963 representing a prepayment.

(4) FEDERAL INCOME TAXES: At December 31, 1963, the company had unused federal income tax loss carry-forwards of approximately $2,700,000, of which approximately $1,070,000 will expire at December 31, 1965, $590,000 at December 31, 1966 and $1,040,000 at December 31, 1967.

(5) LONG TERM DEBT AND LINE OF CREDIT: At December 31, 1963, the company owed the First National Bank in Dallas $1,450,000 at 6% interest payable in 14 monthly installments of $25,000 and the then unpaid balance on March 16, 1965. The loan is secured by a first mortgage on all land, buildings, fixtures, furniture and equipment owned by the company. Under terms of the loan agreement, the company agrees among other things it will not (a) permit net working capital (excluding prepaid expenses as a current asset and excluding the debt hereunder as a current liability) to be less than $2,500,000 (working capital under this provision was approximately $2,800,000 as at December 31, 1963) or (b) pay any cash dividend or acquire any of the company's own capital stock.

In addition, at December 31, 1963, the company owed under a line of credit $2,400,000 on a 6% note secured by a general assignment of accounts receivable.

(6) RESTRICTED STOCK OPTION PLAN: Under a restricted stock option plan approved by the stockholders on April 17, 1962, options were outstanding at December 31, 1963 to purchase 13,700 shares (of which 3,425 are presently exercisable) at $4.88 per share, which was fair market value at dates the options were granted. No options were granted or exercised during the year ended December 31, 1963 and options covering 12,100 shares were canceled. An additional 36,300 shares are reserved for options which have not yet been granted.

(7) CONTINGENT LIABILITY: A dealer who previously purchased scrap metal pursuant to a written contract with the company, has commenced suit alleging that such contract was for an indefinite period and claiming damages in the amount of $4 million for the alleged wrongful termination of such contract in July, 1963. In the opinion of legal counsel, based upon facts supplied by the officers of the Corporation, there exist several legal defenses to this claim, including the defense that said contract was terminable by the Corporation, which defenses would constitute a complete bar to any recovery by the plaintiff.

(8) RECLASSIFICATION: Freight expenses on shipments to customers previously treated as a reduction of sales have been reclassified in 1962 as a selling expense to conform with the classification adopted in 1963. (See Note 3 for a restatement applicable to 1962.)

(9) SUBSEQUENT EVENTS: Subsequent to December 31, 1963 the company entered into several arrangements with Republic-Transcon Industries, Inc. and its subsidiary Textite, Inc. including the authorization to purchase or the purchase of certain facilities and equipment at approximately $757,000.

4-22-64 (311 759)

Gdiaz 4/64

Attached 1-139M

Dun & Bradstreet Report

FINANCIAL STATEMENT

In the interest of speed financial statements are issued as received. These figures are subsequently to be reviewed in relation to rating and included in the report when revised.

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121-6001 A ST I MAR 27 1964 N
RHEEM MANUFACTURING COMPANY (INC) HOLDING COMPANY, MNFR STEEL & FIBER CONTAINERS, WATER HEATERS & PLUMBING FIXTURES & INSULATED PANELS
400 PARK AVE
NEW YORK 22 N Y

RHEEM MANUFACTURING CO.

Consolidated Income Account, years ended

Dec. 31:	[1]1963	1963
Net sales	$138,961,737	$134,086,579
Divs. received	963,238	646,830
Other income	360,280	289,360
Total	318,229,305	315,022,769
Cost of sales	181,387,913	181,833,115
Selling, etc., exp.	11,350,279	11,151,904
Interest	955,237	1,125,624
Fed. income taxes	950,000	300,000
Minority interest	25,786	43,546
Sh. fgn. cns. earn.	491,467	467,317
[1]Net profit	4,148,615	1,843,527
Retain. earn., 1-1	4,414,947	3,273,510
Retain. earn., 12-31	[2]8,563,562	4,414,947
[3]Times int. earn.	5.08	2.18
Earn., com. share	$2.04	$0.52
Cash flow, com. sh.	3.06	1.70
No. of com. shares	2,031,315	2,010,109

[1]After $2,077,270 (1963, $2,362,763) depres. & amort. [2]$3,000,000 not restricted. [3]Incl. Roberts Electronics, Inc. (formerly 38.1% owned) from Oct. 1, 1963. [4]Bef. inc. taxes.

Consolidated Balance Sheet, as of Dec. 31:

Assets:	1963	1962
Cash	$8,412,484	$3,663,151
Receivables, net	25,674,862	19,837,357
[1]Fin. & in proc.	10,348,217	11,778,100
[2]Raw mater., etc.	9,064,383	8,965,290
Prepayments, etc.	341,495	348,943
Total current	$61,961,341	$42,407,245
[3]Net property	17,677,422	18,856,871
Land	488,085	496,185
[4]Inv. fgn. affil.	15,101,331	12,464,558
Other assets	3,963,726	3,050,572
Total	$78,612,135	$77,575,431
Liabilities:		
Accounts payable	$4,673,132	$4,525,470
Notes payable		1,500,000
Debt due	2,313,000	1,979,000
Accruals	5,351,460	5,744,047
Retire. plan	779,164	760,464
Fed. inc. tax prov.	1,190,596	860,531
Total current	$13,049,452	$15,253,512
Deb. 3½s, 1975	18,500,000	17,800,000
Notes payable	2,700,000	4,200,000
Def. Fed. inc. tax	319,000	219,000
Minority interest	173,350	147,350
Warr. cost res.	1,341,342	1,280,519
Com. stock ($1)	2,031,315	2,010,109
Capital surplus	34,437,980	34,147,884
Earned surplus	8,559,003	4,414,947
Total	$78,612,135	$77,575,431
Net current assets	$28,911,889	$26,153,733
Net tang. com. sh.	$22.17	$20.15
[1]Depr. & amor.	$26,780,594	$24,597,625

[1]Lower cost or mkt. [2]Comptrs.: Cos. 50% or more owned at equity underly. net assets: $12,728,787 (1963, $8,490,748); cos. less than 50% at cost, $5,362,794 (1963, $3,814,418) (approx. equity in underly. net assets, $3,950,000 (1963, $3,000,000)); total, $18,336,581 (1963, $12,464,558).

3-27-64 (582)

Exhibit 12

PLEASE NOTE WHETHER NAME, BUSINESS AND STREET ADDRESS CORRESPOND WITH YOUR INQUIRY.

This report is furnished by DUN & BRADSTREET, Inc. in STRICT CONFIDENCE at your request under your subscription agreement for your exclusive use as an aid in determining the advisability of granting credit or insurance, and for no other purpose. DUN & BRADSTREET, Inc. does not guarantee the correctness of the report and shall not be liable for any loss or injury caused by the neglect or other act or failure to act on the part of said company and/or its agents in procuring, collecting or communicating any information.

AMERICAN-Standard PLUMBING AND HEATING DIVISION

40 West 40th Street, New York 18, N. Y., Tel. OXford 5-5600 Sales and Marketing Department, Plumbing Products

July 1, 1963
PP-42-63

TO ALL PLUMBING DISTRIBUTORS

SUBJECT: Distributor Inventory Purchase Plan

Effective with the announcement of the discontinuance of regular enamel plumbing fixtures, as covered by Bulletin PP-33-63, dated July 1, 1963, prices for enameled tubs as contained in Bulletin PP-9-63, Distributor Inventory Purchase Plan, are withdrawn.

Effective with the opening of business July 1, 1963, revised Distributor Inventory Purchase Plan prices for Acid-Resisting Enamel White and Color Tubs are as shown on the attached schedule.

Prices for applicable items of Chinaware as included in Bulletin PP-9-63 continue unchanged. For your convenience, the attached schedule updates PP-9-63 in line with the above.

AMERICAN-STANDARD
PLUMBING AND HEATING DIVISION

DISTRIBUTION: D-A, D-B, D-1, D-10-9

/Exhibit A by/

AMERICAN RADIATOR & STANDARD SANITARY CORPORATION

610

ARSS 4784

238-135 O - 66 - 3

PP-42-63 July 1, 1963

DISTRIBUTOR INVENTORY PURCHASE PLAN
Effective - July 1, 1963

Terms and conditions applying to the submission of Distributors' Inventory Purchase Plan orders are as follows:

1. Regular freight, cash discount and other general terms and conditions of sale apply except that no price protection of any kind is available at these prices.

2. To qualify for Distributor Inventory Purchase Plan prices, orders must be in truckload or carload quantities for at once shipment at our convenience. Distributor Inventory Purchase Plan china items, listed below, may be combined with other items of Chinaware to make truckload or carload weight. The same rule applies to enamelware truckloads or carloads.

3. This special offer is for immediate acceptance only and does not withdraw distributor net prices for these items listed in our current DP-32 price book.

4. We continue to reserve the right to limit quantity purchases.

5. This offer is subject to withdrawal at our option without prior notification. Only those orders postmarked as being in the mail to us prior to the effective date of the withdrawal will be accepted on the basis of prices noted below.

6. Please be certain that all orders placed with us on the basis of this plan bear the notation, PP-42-63, when forwarded to the District Office serving your territory.

7. Prices are subject to the addition of any applicable Manufacturers' or Sales Tax.

CAST IRON ENAMELED WARE

Plate Number	Description	Distributors' Net Price Each A.R. Enameled Color	White
P 2185) P 2187)	5' Contour - recess bath, less fittings	$66.25	$53.50
P 2255) P 2257)	5' Master Bildor - recess bath, less fittings	48.95	44.50

VITREOUS CHINA WARE

	LAVATORIES	Color	White
F 122	Comrade 20x18" lavatory, less all fittings	$12.25	$9.80
F 321	Declyn 19x17" lavatory, less all fittings	9.90	7.90

TWO-PIECE COUPLED CLOSET COMBINATIONS
With Bolt Caps, Less Supply

		Color	White
F 2109	Elongated Cadet, less seat	$31.25	$25.00
F 2120	Cadet, 10" rough - less seat	26.90	21.50
F 2122	Cadet, 12" rough - less seat	24.40	19.50
F 2124	Cadet, 14" rough - less seat	26.55	21.25
F 2116	Compton - less seat	22.40	17.90
F 2109, F 2120) F 2122, F 2124, F 2116)	If with water control with back flow preventer, add----------	.50	.50

Edward A Ayer 611

AMERICAN-Standard

Plumbing Fixtures and Fittings distributors' price book

DP-32

JULY 1, 1963

Distributors' Prices

Freight Conditions—See page 51.

notice: The suggested Consumer Prices shown herein do not include freight or cartage, installation or any local taxes.

	Pages
General terms	2
Cast iron and steel	
Baths	3-4
Lavatories	5-6
Urinals	6
Sinks	7-12
Drinking fountains	12-13
Wash sinks	13
Vitreous china ware	14-29
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Food waste disposers	48

AMERICAN-Standard
PLUMBING AND HEATING DIVISION
AMERICAN RADIATOR & STANDARD SANITARY CORPORATION

612

AMERICAN-Standard

plumbing fixtures

ENAMELED WARE

catalog page	number	description	size inches	approx. ship. wt. pounds	Suggested Consumer Price: Acid-Resisting Enamel Color	Suggested Consumer Price: Acid-Resisting Enamel White	Distributors' Net Price each: Acid-Resisting Enamel Color	Distributors' Net Price each: Acid-Resisting Enamel White
		Recessed receptor baths (less rod and curtain)						
1-6	P 2120 P 2125	Left outlet / Right outlet — Bath—less all fittings	38x39	280	$148.00	$133.25	$ 84.36	$ 75.93
	P 2120-10 P 2125-10	With N 1010 Heritage fitting with N 1700-12 pop-up drain		294	189.55	174.75	.....	.....
	P 2120-14 P 2125-14	With N 1020 Heritage fitting with N 1700-12 pop-up drain		296	190.05	175.25	.....	.....
	P 2120-40 P 2125-40	With N 1030 Push-Pull fitting with N 1700-12 pop-up drain		293	187.05	172.25	.....	.....
		Note: Above Heritage & Push-Pull fittings available with integral stops, refer to fittings section.						
		cast iron baths (less fittings)	size feet					
1-7A	P 2185 P 2187	Right outlet / Left outlet — Contour—recess	5 5½	335 400	136.15 170.15	119.10 153.15	77.60 96.97	67.88 87.28
1-7	P 2190 P 2192	Right outlet / Left outlet — Contour—recess "above the floor" roughing	5	335	136.15	119.10	77.60	67.88
1-7B	P 2195 P 2197	Right outlet / Left outlet — Contour—corner	5	385	166.40	149.75	94.82	85.33
1-8	P 2207 P 2212	Right outlet / Left outlet — Master Pembroke—corner	4½ 5½	358 408	164.25 192.05	147.85 172.85	93.61 109.46	84.25 98.52
1-9	P 2225 P 2227	Right outlet / Left outlet — Master Pembroke—recess	4½	314	140.55	126.50	80.09	72.08
1-10	P 2255 P 2257	Right outlet / Left outlet — Master Bilder—recess	4½ 5	270 290	100.25 95.85	94.10 90.95	57.13 54.61	53.61 51.84
		steel baths (less fittings)						
1-11	S 120 S 122	Right outlet / Left outlet — Salem—recess	4½	114	88.80	80.75	50.60	46.00
1-12	S 125 S 127	Right outlet / Left outlet — Salem—recess	5	136	89.05	80.95	50.75	46.14
1-12A	S 145 S 147	Right outlet / Left outlet — Salem—corner	5	143	120.65	109.65	68.75	62.50
					Price		each	Price
1-12B	P 2135	Adjustable support for built-in baths (approx. ship. wt. 2 pounds) ....each			$ 2.20		each	$ 1.16
	P 2600	Glossgard Powder — Per case			7.30			4.14
		Glossgard Powder — Per package			.65			.36
		(12—1½ pound packages to a case, approximate shipping weight 19 lbs.)						
		Tube drilled other than regular, add per hole			2.10			1.17

ALL FIXTURES ARE PRICED LESS FITTINGS UNLESS OTHERWISE INDICATED.

This Price List has been prepared for the convenience of American-Standard distributors only. The suggested consumer prices shown represent fixed markups over distributor prices to reflect reasonable selling and distribution expenses and do not purport to represent actual prices prevailing in any particular market.

AMERICAN-Standard

plumbing fixtures

VITREOUS CHINA WARE

catalog page	number	description	size inches	approx. ship. wt. pounds	Suggested Consumer Price Color	Suggested Consumer Price White	Distributors' Net Price each Color	Distributors' Net Price each White
		lavatories (cont.)						
		Comrade (less supply pipes and trap)						
2-7	F 122	lavatory only on 4" centers, less all fittings	20x18	41	$ 26.40	$ 21.15	$ 15.04	$ 12.04
			24x20	54	75.75	50.50	43.16	28.77
not illust.		F 121-30 with N 2061 Push-Pull fitting with pop-up drain, R 2800 legs	20x18	51	61.95	56.70	.....	.....
			24x20	64	111.30	86.05	.....	.....
		F 121-32 with N 2061 Push-Pull fitting with pop-up drain, R 2820 legs with towel bars	20x18	53	69.50	64.25	.....	.....
			24x20	66	118.85	93.60	.....	.....
2-7		F 121-40 with N 2001 Heritage fitting with pop-up drain, R 2800 legs	20x18	51	58.45	53.20	.....	.....
			24x20	64	107.80	82.55	.....	.....
		F 121-42 with N 2001 Heritage fitting with pop-up drain, R 2820 legs with towel bars	20x18	53	66.00	60.75	.....	.....
			24x20	66	115.35	90.10	.....	.....
		F 121-43 with N 2041 Heritage fitting with chain and stopper drain, R 2800 legs	20x18	50	53.35	48.10	.....	.....
			24x20	62	102.70	77.45	.....	.....
		F 121-44 with N 2041 Heritage fitting with chain and stopper drain, R 2820 legs with towel bars	20x18	52	60.90	55.65	.....	.....
			24x20	64	110.25	85.00	.....	.....
		F 121-60 with N 2055 single lever fitting with pop-up drain, R 2800 legs	20x18	51	69.85	64.55	.....	.....
			24x20	63	119.15	93.90	.....	.....
		F 121-62 with N 2055 single lever fitting with pop-up drain, R 2820 legs with towel bars	20x18	53	77.35	72.10	.....	.....
			24x20	65	126.70	101.45	.....	.....
not illust.		F 122-30 with N 2061 Push-Pull fitting with pop-up drain	20x18	47	51.10	45.80	.....	.....
			24x20	60	100.40	75.15	.....	.....
2-7		F 122-40 with N 2001 Heritage fitting with pop-up drain	20x18	47	47.55	42.30	.....	.....
			24x20	60	96.90	71.65	.....	.....
		F 122-43 with N 2041 Heritage fitting with chain and stopper drain	20x18	46	42.45	37.20	.....	.....
			24x20	58	91.80	66.55	.....	.....
		F 122-60 with N 2055 single lever fitting with pop-up drain	20x18	47	58.95	53.65	.....	.....
			24x20	59	108.25	83.00	.....	.....
		Merrilyn (less supply pipes and trap)						
2-8	F 140	Lavatory only on 8" centers, less all fittings	20x18	33	38.85	25.90	22.14	14.76
			28x20	48	87.10	58.05	49.62	33.08
	F 141	Lavatory only on 4" centers, less all fittings	20x18	33	38.85	25.90	22.14	14.76
		F 140-40 with N 2101-8 Heritage fittings with pop-up drain	20x18	41	65.45	52.50	.....	.....
			28x20	56	113.65	84.60	.....	.....
		F 140-43 with N 2141-8 Heritage fitting with chain and stopper drain	20x18	40	60.30	47.35	.....	.....
			28x20	55	108.55	79.50	.....	.....
		†F 140-50 with N 2111-8 Monogram fitting with pop-up drain	20x18	41	93.25	80.30	.....	.....
			28x20	56	141.50	112.45	.....	.....
		†Untinted transparent handles regularly furnished. If with colored translucent handles, specify and add	.....	.....	2.15	2.15	1.20	1.20
		†Snap-in buttons, personalized with 2 engraved initials in either Block or Old English for Monogram handles only ..... Set of two (2)	.....	.....	6.15	6.15	3.50	3.50
		Type "B" stainless steel mounting frame for 28x20" size only	.....	4	8.40	8.40	4.78‡	4.78‡
		‡Frame f.o.b. Factory. No freight allowed.						
		F 141-30 with N 2061 Push-Pull fitting with pop-up drain	20x18	39	63.55	50.60	.....	.....
		F 141-40 with N 2001 Heritage fitting with pop-up drain	20x18	39	60.00	47.10	.....	.....
		F 141-43 with N 2041 Heritage fitting with chain and stopper drain	20x18	38	54.90	41.95	.....	.....
		F 141-60 with N 2055 single lever fitting with pop-up drain	20x18	39	71.40	58.45	.....	.....
		Note: Fittings—if ⅜" tailpieces required, order separately. See page 35.						
		For valve inlets arranged to slip ½" O.D. tubing affix letters SJ to fixture suffix number. No extra charge.						

ALL FIXTURES ARE PRICED LESS FITTINGS UNLESS OTHERWISE INDICATED.

This Price List has been prepared for the convenience of American-Standard distributors only. The suggested consumer prices shown represent fixed markups over distributor prices to reflect reasonable selling and distribution expenses and do not purport to represent actual prices prevailing in any particular market.

AMERICAN-Standard

VITREOUS CHINA WARE — plumbing fixtures

catalog page	number	description	size inches	approx. ship. wt. pounds	Suggested Consumer Price Color	Suggested Consumer Price White	Distributors' Net Price each Color	Distributors' Net Price each White
		lavatories (cont.) Firmledge (less supply pipes and trap)						
2-17	F 310-40	with N 2107 Heritage fitting with pop-up drain	19x17	49	.....	$ 65.60	.....	$ 37.38
	F 310-45	with N 2160 Heritage fitting—plug with perforated grid	19x17	49	.....	59.75	.....	34.04
7-5	F 310-70	with C 507-1F Colony fitting with pop-up drain	19x17	49	.....	61.80	.....	35.20
	F 310-73	with C 547-1 Colony fitting with chain and stopper drain	19x17	49	.....	56.65	.....	32.28
	F 310-75	with C 550-1 Colony fitting—plug with perforated grid	19x17	49	.....	56.15	.....	31.99
2-15	F 312-33	with N 2161 Heritage supply spout and supply ell with coupling—plug with perforated grid	19x17	46	.....	57.55	.....	32.78
	F 314-45	with N 2160 Heritage fitting—plug with perforated grid	19x17	49	.....	61.80	.....	35.21
7-5	F 314-75	with C 550-1 Colony fitting—plug with perforated grid	19x17	49	.....	58.20	.....	33.16
	F 310	Heritage fitting with NU-RE-NU self-closing supply valves .....add	.....	.....	.....	9.05	.....	5.14
2-15	F 321	Declyn—on 4" centers, less fittings	19x17	33	$ 22.45	17.95	$ 12.78	10.22
2-16	F 350	New Lucerne—on 8" centers, less fittings	20x18	46	41.15	27.45	23.43	15.62
	F 351	New Lucerne—on 4" centers, less fittings	24x20	61	.....	46.90	.....	26.73
	F 370	Penhurst—on 8" centers, less fittings	18x15	38	.....	27.05	.....	15.40
	F 371	Penhurst—on 4" centers, less fittings						
2-17	F 380	Buena—on 8" centers, less fittings and support	20x18	39	43.50	29.00	24.78	16.52
	F 381	Buena—on 4" centers, less fittings and support	24x20	51	63.15	42.10	35.97	23.98
		For supports see page 22.						
		Viking (less supply pipes and trap)						
2-18	F 385-40	with N 2107 Heritage fitting with pop-up drain	17x17	51	88.65	66.85	50.53	38.10
	F 385-43	with N 2147 Heritage fitting with chain and stopper drain	17x17	51	83.30	61.50	47.47	35.04
7-5	F 385-70	with C 507-1F Colony fitting with pop-up drain	17x17	51	84.85	63.05	48.35	35.92
	F 385-73	with C 547-1 Colony fitting with chain and stopper drain	17x17	51	79.70	57.90	45.43	33.00
	F 310	If with end trim in place of aerator, specify and deduct	.....	.....	1.30	1.30	.72	.72
		Available with vandal proof aerator when specified, add	.....	.....	.35	.35	.19	.19
	F 312	Note: Fittings—if ⅜" tailpieces required, order separately. See page 35.						
	F 314							
	F 385	For valve inlets arranged to slip ⅜" O.D. tubing affix letters SJ to fixture suffix number. No extra charge.						

ALL FIXTURES ARE PRICED LESS FITTINGS UNLESS OTHERWISE INDICATED.

This Price List has been prepared for the convenience of American-Standard distributors only. The suggested consumer prices shown represent fixed markups over distributor prices to reflect reasonable selling and distribution expenses and do not purport to represent actual prices prevailing in any particular market.

AMERICAN-Standard

VITREOUS CHINA WARE — plumbing fixtures

catalog page	number	description	approx. ship. wt. pounds	Suggested Consumer Price Color	Suggested Consumer Price White	Distributors' Net Price each Color	Distributors' Net Price each White
		two-piece coupled closet combinations (cont.) (less supply and stop)					
3-5	F 2090-11	Norwall with NW 209 closed front seat with cover..... †Seat in plain color only.	123	†$188.95	$138.55	†$107.70	$78.96
3-5	‡F 2094	Glenwall, less seat..... Carrier fitting required to be furnished by others.	99	88.30	70.65	50.33	40.26
		Note: If trip lever with satin chrome finish.....add	.....	1.30	1.30	.72	.72
3-6	‡F 2109	Elongated Cadet, less seat.....	96	65.35	52.30	37.24	29.80
3-6A	‡F 2116	Compton, less seat.....	93	50.70	40.55	28.89	23.11
3-6	‡F 2120	New Cadet—10" rough, less seat.....	92	54.65	43.70	31.14	24.91
	‡F 2122	New Cadet—12" rough, less seat.....	92	53.90	43.20	30.72	24.61
	‡F 2124	New Cadet—14" rough, less seat.....	92	53.90	43.20	30.72	24.61
		low tank closet combinations (less seat and supply pipe)					
3-6A	‡F 2180	Siacto.....	102	78.65	56.90	44.82	32.41
	‡F 2186	Modernus.....	97	67.00	49.15	38.17	28.00
	F 2094 F 2109 F 2116 F 2120 F 2122 F 2124 F 2180 F 2186	If with water control with backflow preventer.....add	.....	2.05	2.05	1.16	1.16
		If with tank cover locking device.....add	.....	5.10	5.10	2.88	2.88
	F 2116 F 2120 F 2186	If less bolt caps, clips, floor screws, nuts and washers, specify and deduct.....	.....	1.25	.85	.70	.46
	F 2109 F 2122 F 2124 F 2180	If less bolt caps and clips, specify and deduct.....	.....	.50	.30	.28	.16
	F 2094 F 2109 F 2116 F 2120 F 2122 F 2124	If with Aquaguard tank liner, add suffix "L" to fixture number, specify and add.....	5	9.65	9.65	5.50	5.50

For supply pipe for above see page 38.

‡For prices on Church seats, refer to their current price sheet.

ALL FIXTURES ARE PRICED LESS FITTINGS UNLESS OTHERWISE INDICATED.

This Price List has been prepared for the convenience of American-Standard distributors only. The suggested consumer prices shown represent fixed markups over distributor prices to reflect reasonable selling and distribution expense and do not purport to represent actual prices prevailing in any particular market.

THE MURRAY CORPORATION OF AMERICA

ELDER PLUMBINGWARE DIVISION

TAYLOR CALDWAY CENTER PITTSBURGH 12, PENNA.

July 12, 1963

TO OUR CUSTOMERS:

SUBJECT: Temporary Prices Applying to Stock Orders

Effective today the special prices announced in our January 30, 1963, bulletin are withdrawn. New special net prices apply to the volume items listed below when ordered for immediate factory shipment of full or mixed carloads or truckloads of vitreous china and iron and full carloads or truckloads of enameled steel unless specific quantities are mentioned. Items in our line other than those listed in this announcement may be included to make minimum weight for full loads.

		A/B Enamel Color	A/B Enamel White
Enameled Cast Iron:			
E-1070/75	5' Samoa Bath	$66.25	$53.50
E-1120/25	5' Riviera Bath	66.25	53.50
E-1180/85	5' Capri Bath	48.95	44.50
Enameled Formed Steel:			
E-1210/15	5' Ventura Bath (One Piece)	39.05	33.50
E-1230/35	5' Gateway Bath	36.30	33.00
	Gateway Color 34.65 White 31.50		
	25 or More		
E-1794	18½x15½" Palm Springs Lavatory	8.25	7.50
E-1794	20x18" Palm Springs Lavatory	8.80	8.00
New E-1764	18" (Round) Seaview Lavatory	8.25	7.50
E-2450/51	32x21" Flat Rim Sink	*9.05	8.25
E-2455/56	24x21" Flat Rim Sink	*6.60	6.00

*Note: Colored Steel Sinks are produced in General Electric Coppertone, Woodtone, Yellow, Turquoise, and Pink; in Westinghouse colors Coppertone, Yellow, Aqua, and Pink only. Colored sinks are available only with 4-hole punching in fitting ledge.

Continued . . .

Exhibit B for I 662

July 12, 1963

	Color	White
Vitreous China:		
E-3224 - 19x17" Blair Lavatory	$ 9.90	$ 7.90
E-3224 - 20x18" Blair Lavatory	12.25	9.80
E-5250 - Emblem Closet - Round Front - 12" Rough	24.40	19.50
E-5254 - Emblem Closet - Round Front - 14" Rough	26.55	21.25
E-5255 - Emblem Closet - Elongated Rim - 12" Rough	31.25	25.00
E-5270 - Ellis Closet - 12" Rough	22.40	17.90
E-5275 - Ellis Closet - 10" Rough	26.90	21.50
For Anti-Siphon Float Valve add . . .	.50	.50

Note: Closet Prices include Bolt Covers but do not include supplies, seats, etc.

These prices apply only to orders placed for immediate shipment and may be withdrawn at any time without notice. Orders on hand or in the mail postmarked prior to the time of withdrawal of these special prices will be shipped at factory convenience. There will be no job price protection at these prices - nor will any orders be accepted for other than immediate shipment.

For all items of china, iron, steel, and brass not listed in this bulletin, refer to current published price sheets for prices.

Regular freight and payment terms apply.

ELJER PLUMBINGWARE DIVISION

Effective B 7/63

NUMBER
WN • 44
JAN. 31, 1963

WHOLESALERS' NET PRICES

APPLYING TO CATALOG 162

vitreous china
enameled cast iron
enameled formed steel
undersink steel cabinets
brass fittings

INDEX

PLATE NUMBERS LISTED NUMERICALLY

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THE MURRAY CORPORATION OF AMERICA
ELJER PLUMBINGWARE DIVISION
THREE GATEWAY CENTER PITTSBURGH 22, PA.

RECEIVED
MAY - 9 1963
S. S. BACKNER
Exhibit BB Pg 1-35

FINE PLUMBING FIXTURES
ELJER
664

CAT. PAGE	PLATE NUMBER	DESCRIPTION	SIZE	Appx. Ship. Wt.	PRICE EACH — ACID RESISTING — COLOR — Suggested Consumer	ACID RESISTING — COLOR — Wholesalers' Net	ACID RESISTING — WHITE — Suggested Consumer	ACID RESISTING — WHITE — Wholesalers' Net	REGULAR — WHITE — Suggested Consumer	REGULAR — WHITE — Wholesalers' Net
		CAST IRON BATHS Less Fittings								
10	E-1040	MONTEGO, Recess	42x37"	270	$152.65	$ 87.00	$135.95	$ 77.50	$120.90	$ 68.90
10	E-1045									
11	E-1050	LEGATION, Recess	5½'	420	220.55	125.70	198.40	113.10	176.40	100.55
11	E-1055									
9	E-1060	DELRAY, Recess	48x42"	330	207.30	118.15	184.25	105.00		
9	E-1065									
12	E-1070	SAMOA, Recess	5'	345	136.15	77.60	119.10	67.90	105.80	60.30
12	E-1075									
17	E-1100	RIVIERA, Corner	5'	385	166.30	94.80	149.75	85.35	133.05	75.85
17	E-1105		5½'	470	192.00	109.45	172.90	98.55	153.60	87.55
			4'	290	220.55	125.70	198.40	113.10	176.40	100.55
			4½'	300	140.55	80.10	126.50	72.10	112.35	64.05
13	E-1120	RIVIERA, Recess	5'	335	136.15	77.60	119.10	67.90	105.80	60.30
13	E-1125		5½'	390	170.10	96.95	153.05	87.25	136.15	77.60
			6'	490	255.00	145.35	229.75	130.95	204.05	116.30
14	E-1180	CAPRI, Recess	5'	295	95.80	54.60	90.90	51.80	86.85	49.50
14	E-1185									
		CAST IRON BATHS To Build in Floor, Less Fittings								
	E-1060	DELRAY, Recess	48x42"		248.80	141.80	221.05	126.00		
	E-1065									
	E-1070	SAMOA, Recess	5'		163.35	93.10	143.00	81.50	126.95	72.35
	E-1075									
	E-1100	RIVIERA, Corner	5'		199.60	113.75	179.65	102.40	159.65	91.00
	E-1105									
	E-1120	RIVIERA, Recess	5'		163.35	93.10	143.00	81.50	126.95	72.35
	E-1125									
	E-1180	CAPRI, Recess	5'		114.95	65.50	109.05	62.15	104.25	59.40
	E-1185									
	NOTE:	Specify apron lengths desired: 4", 5¼" or 7¾".								
		CAST IRON INSTITUTIONAL BATHS Less Fittings								
Not Shown	E-15745	A/R Enameled All Over Bath with 1½" outlet and A/R Base	66x31"	910			448.00	255.35		
	E-15746	A/R Enameled All Over Bath with 1½" outlet	66x31"	600			285.55	162.75		
		Baths drilled other than regular, add per hole			2.10*	1.20*	2.10*	1.20*	2.10*	1.20*

CAT. PAGE	PLATE NUMBER	DESCRIPTION	SIZE	Appx. Ship. Wt.	PRICE EACH * ACID RESISTING COLOR Suggested Consumer	ACID RESISTING COLOR Wholesalers' Net	ACID RESISTING WHITE Suggested Consumer	ACID RESISTING WHITE Wholesalers' Net	REGULAR WHITE Suggested Consumer	REGULAR WHITE Wholesalers' Net
		FORMED STEEL BATHS Less Fittings								
18	E-1200	LAKE FOREST, Corner	5'	143	$121.30	$ 69.15	$110.35	$ 62.90		
18	E-1205									
N...	E-1210	VENTURA, One-Piece								
	E-1215	Recess	5'	138	85.70	48.85	77.90	44.40		
16	E-1220	WESTCHESTER, Recess	4½'	120	83.95	47.85	76.35	43.50		
16	E-1225	◆ Discontinued—Price applies to stock on hand	5'	130	82.30	46.90	74.85	42.65		
15	E-1230	GATEWAY, Recess	4½'	114	82.30	46.90	74.85	42.65		
15	E-1235		5'	126	82.30	46.90	74.85	42.65		
		CAST IRON LAVATORIES Less All Fittings, unless otherwise described								
20	E-1476	BRUCE, Shelf Back, with E-9343-A LIFETIME fitting with Aerator and Pop-up Waste	19x17"	75	51.95	29.60	48.35	27.55	$ 44.75	$ 25.50
			22x19"	85	57.90	33.00	53.70	30.60	49.50	28.20
20	E-1477	BRUCE, Shelf Back, with E-9344-A LIFETIME fitting with Aerator, P.O. Plug, Chain and Stopper	19x17"	75	50.85	28.95	47.25	26.90	43.65	24.85
			22x19"	85	56.80	32.35	52.60	29.95	48.40	27.55
	NOTE:	Bruce Lavatories available with Lusterline Handles to match Lusterline Tub Trim at No Change in Price.								
	E-1476 and E-1477	If ordered with Vandal-Proof Aerator, specify and add			.35	.20	.35	.20	.35	.20
		If ordered less Aerator, specify and deduct			1.40	.80	1.40	.80	1.40	.80
32	E-1490	AMHERST (for counter top) Cock Holes 8" centers	20x18"	45	24.05	13.70	21.65	12.35	19.20	10.95
32	E-1494	AMHERST (for counter top) for Centerset Fitting	20x18"	45	24.05	13.70	21.65	12.35	19.20	10.95
32	E-9920	Stainless Steel Frame for Amherst	20x18"	2	6.95	3.95	6.95	3.95	6.95	3.95
36	E-1504	BURKE (for counter top) Ledge for Centerset Fitting	18"	35	23.95	13.65	21.60	12.30	19.15	10.90
36	E-9912	Stainless Steel Frame for Burke	18"	2	8.00	4.55	8.00	4.55	8.00	4.55
N...	E-1630	BUCKNELL	19x17"	55	27.90	15.90	25.10	14.30	22.30	12.70
	E-1634		20x18"	63	31.65	18.05	28.45	16.20	25.35	14.45
New	E-1640	BUCKNELL, with E-1639 enameled cast iron leg	19x17"	80			36.95	21.05	32.85	18.70
	E-1644		20x18"	88			40.25	22.95	35.90	20.45
26	E-1650	TAMPA	18x18"	73			45.90	26.15	40.70	23.20
26	E-1661									
	NOTE:	FOR LEGS AND TOWEL BARS, REFER TO BRASS SECTION, Page 32								

CAT. PAGE	PLATE NUMBER	DESCRIPTION	SIZE	Approx. Ship. Wt.	PRICE EACH — ACID RESISTING — COLOR — Suggested Consumer	COLOR — Wholesalers' Net	WHITE — Suggested Consumer	WHITE — Wholesalers' Net
		FORMED STEEL LAVATORIES Less All Fittings, unless otherwise described						
	E-1785	PINEHURST	20x18"	23	$ 23.10	$ 13.15	$ 20.95	$ 11.95
25	E-1786	PROVINCETOWN, with Hanger, Overflow and Overflow Plate	24x18"	28	31.35	17.85	28.35	16.15
25	E-1787	Baked White Enamel Cabinet with two Doors, for PROVINCETOWN Lavatory	24x18"	34	F.O.B. SCRANTON FREIGHT TO BE ADDED		43.50	24.80
32	E-1794	PALM SPRINGS, with Front Overflow, for Counter installation ◆	18½x15½"	11	14.75	8.40	13.45	7.65
			20x18"	12	15.70	8.95	14.30	8.15
			21x17"	12	15.70	8.95	14.30	8.15
32	E-9918	Stainless Steel Frame for PALM SPRINGS ◆	18½x15½"	3	6.95	3.95	6.95	3.95
			20x18"	3	6.95	3.95	6.95	3.95
			21x17"	3	6.95	3.95	6.95	3.95
		◆ Discontinued—Subject to stock on hand						
		CAST IRON WASH SINKS Less All Fittings						
40	E-1800	BLAINE, with Back Supported on Concealed	4'x18"	200			127.30	72.55
40	E-1801	Hangers. Less Soap Dishes, Less Brackets	5'x18"	270			145.35	82.85
40	E-1802		6'x18"	330			163.25	93.05
		For Painted Brackets for BLAINE pair		25			3.25	1.85
New	E-1805	WASHBURN, with Back Supported on Concealed Hangers. Less Painted Pedestals, Less Soap Dishes	8'x22"	440			323.70	184.50
40	E-9797	C.P. Soap Dish for BLAINE and WASHBURN per dish					1.75	1.00
40	E-1810	TELFAIR, with Pipe Supports. Less Painted Pedestals, Less Soap Dishes	4'x30"	230			139.75	79.65
			5'x30"	290			189.65	108.10
		For Painted Pedestals for Wash Sinks pair		110			27.80	15.85
		For Regular Enamel Pedestals for Wash Sinks pair		115			51.75	29.50
40	E-9799	C.P. Soap Dish for TELFAIR per dish					1.75	1.00
	NOTE:	Pedestals regularly furnished to set Rim of Sink 30½" to 31½" from floor						
		Can be furnished on special order to set Rim of Sink 25½" to 26½" from floor, 36" from floor — add per pair					NO EXTRA CHARGE 5.35	3.05
		Wash Sinks drilled other than regular — add per hole					2.10*	1.20*
		CAST IRON DRINKING FOUNTAIN						
80	E-1895	HARTFORD, complete with fittings, less Trap	44½x13"	105			Reg. Econ. 203.90	Reg. Econ. 116.20

RECEIVED
FEB-6 1963

January 30, 1963

S. S. BACKNER

TO: All regional managers

FROM: C. J. Callanan, Jr.

SUBJECT: SPECIAL STOCK BUYING OPPORTUNITY - PLUMBING FIXTURES-REVISED (2)

Effective with the close of business Friday, February 1, 1963, the "Special Stock Buying Opportunity - Plumbing Fixtures-Revised" bulletin dated January 2, 1963, is cancelled.

However, we offer the special pricing listed below to meet the competitive situation now existing. These prices become effective on all new orders received on or after Monday, February 4, 1963. They are on a temporary basis until further notice. They are subject to withdrawal without notice and apply to all stock orders specifying immediate shipment at our convenience.

Shipments based on Project Report coverage will be priced as per the coverage or this special pricing, whichever is lower.

These prices are for shipments in truckload or carload quantities.

225-7 5'	R.E.	$51.50
	A.R.	57.95
	Color	66.25
232-4 5'	R.E.	42.50
	A.R.	44.55
	Color	46.90
847-9	R.E.	9.31
	A.R.	10.48
	Color	11.64
851-3	R.E.	9.29
	A.R.	10.44
	Color	11.60
2115-32"	White A.R.	17.50
2600 (19 x 17)	Color	24.28
	White A.R.	21.28
	White	19.60
2600 (22 x 19)	Color	27.05
	White A.R.	23.77
	White	21.83

continued

L-[illegible] (20 x 18)	White	$ 9.80
	Color	12.25
L-[illegible] (19 x 17)	White	7.90
	Color	9.90
L-[illegible]	White	12.10
	Color	13.93
L-[illegible] (20 x 18)	White	11.72
	Color	17.59
L-[illegible]	White	25.00
	Color	31.25
L-[illegible], G-2220, G-2240 (Regular E.C.)	White	19.50
	Color	24.40
L-[illegible] (Regular E.C.)	White	17.90
	Color	22.40
For [illegible] add		.50

Best regards,

C. J. Callanan, Jr.

[illegible]

[illegible] - Chicago	W. H. Paas - Chicago
[illegible] - Chicago	H. A. Smith - Metuchen
[illegible] - Chicago	E. Dithridge - Monaca
[illegible] - Chicago	J. Crawford - Metuchen
[illegible] - Chicago	D. Nelson (6) - Chicago
[illegible] - Phila.	R. Hayduck - Metuchen
[illegible] - Chicago	E. W. Manstrom - Los Angeles
[illegible] - Metuchen	E. C. Smith - Dallas

EXHIBIT C pg. 2

700

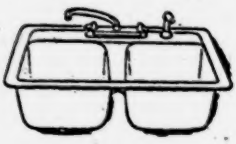
WHOLESALE *Price List*

RECEIVED
MAY - 3 1963

No. PF-W24
EFFECTIVE MAY 6, 1963
SUPERSEDES PRICE SHEET
PF-W23

S. S. BACKNER

PLUMBING FIXTURES
fashioned by Rheem



ENAMELED WARE • VITREOUS CHINA • PERMA-GLOSS

RHEEM MANUFACTURING COMPANY
HOME PRODUCTS GROUP
7600 S. Kedzie, Chicago 52, Illinois

Plumbing fixtures manufactured at Metuchen, N. J. and Monaca, Pa. plants.

REGIONAL SALES OFFICES
Boston, Massachusetts—763B Concord Ave., Cambridge 38, Mass. (491-0850)
Chicago, Illinois—7600 South Kedzie Avenue (HEmlock 4-7500)
Dallas, Texas—2130 Lofland Street (MElrose 1-2420)
Detroit, Michigan—11000 W. McNichols Road (UNiversity 4-0695)
Los Angeles, Calif.—6283 Slauson Avenue (OVerbrook 5-8411)
New York, New York—370 Lexington Avenue (MUrray Hill 3-6871)
Philadelphia, Penna.—Whitaker & Godfrey Aves. (Pioneer 4-5900)

701
W Exhibit CC-4P
WD4 1-16

...ern tubs — enameled cast iron
— enameled formed steel

	plate no.	description	size	ship. wgt. lbs. (app.)	Suggested Consumer Price			Wholesaler's Net Price Each		
					acid-resisting enamel		regular enamel	acid-resisting enamel		regular enamel
					color	white	white	color	white	white
		POMPEII								
cast iron square (less fittings)	250	RHO	48x44	435	$266.95	$241.05		$152.17	$137.40	
	252	LHO								
		BLAKE								
corner (less fittings)	219	RHC, RHO	5'	390	166.43	149.78	$133.14	94.87	85.38	$75.89
	221	LHC, LHO								
		BRESLIN								
recess (less fittings)	225	RHO	4½'	317	140.54	126.53	112.46	80.10	72.12	64.10
	227	LHO	5'	355	136.19	119.07	105.84	77.63	67.87	60.33
			5½'	410	170.10	153.09	136.08	96.96	87.27	77.56
		LoSEAT								
	232	RHO	4½'	266	100.30	94.15	89.80	57.16	53.66	51.18
	234	LHO	5'	305	95.76	90.98	86.78	54.58	51.86	49.47
*Sunken baths (less fittings)		**BLAKE**								
	219-S	with 4", 5¾" or	5'	—	199.60	179.70	159.70	113.76	102.42	91.02
	221-S	7¾" apron								
		BRESLIN								
	225-S	with 4", 5¾" or	5'	—	163.35	142.95	126.95	93.12	81.48	72.36
	227-S	7¾" apron								
		LoSEAT								
	232-S	with 4" or 5¾"	5'	—	114.95	109.05	104.20	65.52	62.16	59.40
	234-S	apron								
		MALIBOU								
steel recess (less fittings)	1106	RHO	5'	131	84.70	76.90		48.27	43.83	
	1108	LHO								
		DAYTONA								
	1110	RHO	5'	138	89.25	81.10		50.87	46.23	
	1112	LHO								
nc	For special tub drillings add per hole						2.05			1.17
	Specify apron height									

238-135 O - 66 - 4

enameled cast iron — lavatories
vitreous china —

	plate no.	description	size	ship. wgt. lbs. (app.)	Suggested Consumer Price			Wholesaler's Net Price Each		
					acid-resisting enamel		regular enamel	acid-resisting enamel		regular enamel
					color	white	white	color	white	white
lavatories cast iron (less fittings unless specified otherwise)	847	**VICTORIA** for comb'n fitting	20x18	50	$24.05	$21.63	$19.22	$13.70	$12.33	$10.95
	848	for centerset fitting								
	851	**ROUNDEL** for combination fitting	18" RD	34	23.95	21.55	19.55	13.65	12.28	10.92
	853	for centerset fitting								
	1047	**LENCOR** w/F-7202 fitting, less all other trim.	16x16	58	* 61.25	55.00	51.30	* 34.90	31.34	29.24
	2600	**NEW LORAIN** w/F-7202 fitting, less all other trim.	19x17	70	* 48.05	43.20	39.70	* 27.38	24.61	22.64
			22x19	80	* 54.00	48.55	44.40	* 30.78	27.66	25.30
	2700	**RICHVAL** with wall hanger only for centerset fitting	19x17	55	23.45	21.10	18.80	13.37	12.03	10.72
	2907	**NEW LONDO** for comb'n fitting	19x17	65	27.88	25.10	22.31	15.89	14.30	12.72
	2909	for centerset fitting	20x18	71	31.66	28.46	25.31	18.05	16.22	14.43
legs, rims for enamel lavatories	F-15	Legs, less towel bars, pr.		7			12.10			6.90
	F-16	Towel bars for F-15, pr.		3			8.40			4.78
	F-549	Metal rim for 847-849	20x18	4			7.45			4.25
	F-550	Metal rim for 851-853	18" RD	3			8.95			5.10
		SUMMIT with F-25 legs, F-26 towel bars & knee brackets			color		white	color		white
lavatories vitreous china (less fittings unless specified otherwise)	G-105	for combination fitting	20x18	45	$48.35		$53.90	$38.97		$30.72
			24x20	70	88.00		67.00	50.17		38.18
	G-107	for centerset fitting	20x18	45	68.35		53.90	38.97		30.72
			24x20	70	88.00		67.00	50.17		38.18
		with leg & knee brackets								
	G-111	for combination fitting	20x18	50	62.90		43.40	35.84		24.73
			24x20	60	82.55		56.45	47.05		32.19
	G-113	for centerset fitting	20x18	50	62.90		43.40	35.84		24.73
			24x20	60	82.55		56.45	47.05		32.19

note: For P. O. plug chain and stopper with 2600 and 1047 lavatories, deduct — 1.00 — .57
For aerator on 2600 and 1047 white only, add — 1.30 — .75
1¼" O.D. tailpieces are regularly supplied 4" long, for each 2" additional length, add — .20 — .11
Supply and drain fittings for 2600 and 1047 are regularly supplied less ¼" MIP Tailpieces. If required note on order and add per pair — .40 — .24

*Colored Price includes aerator

vitreous china — lavatories

plate no.	description	size	ship. wgt. lbs. (app.)	Suggested Consumer Price color	Suggested Consumer Price white	Wholesaler's Net Price Each color	Wholesaler's Net Price Each white
	COUNTESS counter						
G-146	for combination fitting	20x18	40	$37.65	$30.10	$21.46	$17.15
G-148	for centerset fitting	20x18	40	37.65	30.10	21.46	17.15
	RICHELIEU						
G-154	with wall hanger only, for centerset fitting	18x15	30	23.30	18.60	13.27	10.61
		19x17	35	22.45	17.95	12.79	10.22
		20x18	40	26.45	21.10	15.09	12.04
		22x19	45	47.10	33.60	26.86	19.15
		24x20	60	75.80	50.50	43.20	28.78
	BERKELEY						
G-160	with F-7202 fitting, less all other trim	19x17	45	*62.25	50.65	*35.47	28.86
	DENTYN						
G-625	with F-505 fitting, less all other trim	14x14	30	74.35	60.85	42.37	34.68
	CIRCLET round, counter-top						
G-2260	for combination fitting	18" RD.	30	30.75	26.75	17.54	15.25
G-2262	for centerset fitting	18" RD.	30	30.75	26.75	17.54	15.25
	LELAND						
G-2280	oval, with flat rim and integral overflow. Top of rim not glazed.	19x15	25	31.25	20.75	17.80	11.84
G-2282	oval, with glazed rim for in counter installation, with F-582 stainless steel rim	19x15	30	44.10	33.80	25.13	19.27
	VOGUE						
G-2290	counter	20x18	35	38.85	25.90	22.14	14.76
	for combination fitting	24x18	40	44.60	29.70	25.42	16.94
		16x14	30	28.70	19.05	16.35	10.87
G-2292	for centerset fitting	20x18	35	38.85	25.90	22.14	14.76
		24x18	40	44.60	29.70	25.42	16.94
	MODERNE						
G-2321	for combination fitting	20x18	38	41.10	27.40	23.42	15.62
G-2323	for centerset fitting	24x20	50	70.10	46.75	39.96	26.64
	VARIMOUNT						
G-2401	for combination fitting	22x18	38	48.75	32.55	27.79	18.54
G-2403	for centerset fitting						
	SACRARIUM						
G-2540	complete with fittings, as described	18x15	41		145.35		82.85
legs							
F-25	Legs, less towel bars, pair		7		12.10		6.90
F-26	Towel bars, for F-25, pair		3		8.40		4.78
rims, clips for vitreous lavatories		16x14	3		7.45		4.25
F-543	metal rim for G-2290—G-2292	20x18	4		7.45		4.25
		24x18	5		7.60		4.33
F-548	metal rim for G-146—G-148	20x18	4		7.25		4.13
F-560	metal rim for G-2260—G-2262	18" RD	3		7.45		4.25
F-580	Aluminum angle clips for G-2280		1		2.10		1.20
F-7262	Metal rim for G-2401-3	22x18	3		8.35		4.75
F-7282	Hold-down kit for G-2401-3		1½		4.10		2.35
	note: For aerator on G-125, G-130, G-133, G-134, G-160 - white only, add				1.30		.75
	*Colored price includes aerator						
	1¼" O.D. tailpieces are regularly supplied 4" long, for each 2" additional length, add				.20		.11
	Supply and Drain fittings for G-125, G-130, G-133, G-134, and G-160 are regularly supplied less ¼" MIP Tailpiece. If required note on order and add per pair				.40		.24
	Special lavatory drillings †						
	for drillings other than regular holes 1" in diameter or larger, add per hole				2.35		1.34
	holes less than 1" diameter, add per hole				1.20		.67
	holes for concealed bracket arms, add per lavatory				4.10		2.34
	†note: 1" diameter hole required for soap dispensers.						

water closets — vitreous china

	plate no.	description	ship. wgt. lbs. (app.)	Suggested Consumer Price color	Suggested Consumer Price white	Wholesaler's Net Price Each color	Wholesaler's Net Price Each white
c. t combinations with regular float valve, unless otherwise specified, with china bolt caps (less supply, seat and screws)		**LARCHMONT** Siphon jet—12" rough					
	G-206	round front	115	$ 99.70	$ 70.75	$ 56.84	$40.32
	G-207	elongated	115	107.00	75.40	60.99	42.99
	G-2210	**CLAYMORE** Reverse trap, round front, 12" rough	105	53.90	43.20	30.71	24.61
	G-2220	**CLARETON** Same as G-2210 except 14" rough	110	53.90	43.20	30.71	24.61
	G-2230	**CRESTON** Same as G-2210 except elongated	115	65.35	52.20	37.25	29.75
	G-2240	**CULVER** Same as G-2210 except 10" rough	110	53.90	43.20	30.71	24.61
		ORTON Washdown, round front bowl with 6 gallon tank, 2" elbow connection					
	G-215	14" rough	100	67.00	49.10	38.18	28.00
	G-216	12" rough	100	67.00	49.10	38.18	28.00
	G-2300	**LA CROSSE** Washdown, round front—12" rough	105	50.70	40.55	28.89	23.11
	G-2310	**LATROBE** Same as G-2300 except 14" rough	105	53.05	42.60	30.23	24.27
		NEW EMPRESS					
	G-3000	one piece, siphon-vortex, 12" rough round front	110	150.65	103.20	85.87	58.82
	G-3005	elongated	115	165.55	115.25	94.35	65.70
(NEW) AVAILABLE June 15, 1963		**PRINCESSE**					
	G-3015	One piece, siphon-vortex, 12" rough elongated, with anti-siphon float valve, R-3890 seat with cover.	122	205.70	148.95	117.25	84.91
		If less seat, specify and deduct:	7	19.65	17.80	11.20	10.15
closet combination, wall hung		**AURORA**					
	G-3200	Reverse trap, round front, with adjustable float valve, less seat, supply, and carrier	125	161.80	113.35	92.22	64.61
		NEW EDEN					
	G-3230	Reverse trap, round front bowl with 6 gallon tank, 2" elbow connection, 12" rough	105	78.30	56.70	44.64	32.31
		note: For anti-siphon float valve, add			2.00		1.12
		For locking device on closet tanks, add			5.05		2.88

sink and tray combinations—sinks — enameled cast iron

	plate no.	description	size	ship. wgt. lbs. (app.)	Suggested Consumer Price			Wholesaler's Net Price Each		
					acid-resisting enamel		regular enamel	acid-resisting enamel		regular enamel
					color	white	white	color	white	white
sink and tray combinations (less fittings, legs, and drainboard) flat rim		**TRAYLOR**								
	2445	right-hand tray	42x25	210		$81.17			$46.26	
	2446	left-hand tray	42x25	210		81.17			46.26	
	1980	sliding enameled drainboard for 2445-6				8.77			5.00	
		HALIFAX								
	4301	right-hand tray	42x21	146		61.75			35.20	
	4302	left-hand tray	42x21	146		61.75			35.20	
	1982	sliding enameled drainboard for 4301-2				7.55			4.30	
					A. R. enamel	regular enamel	painted	A. R. enamel	regular enamel	painted
					white	white	white	white	white	white
legs for sinks and sink-and-tray combinations	1998A	**SQUARE** sink		15	$ 9.66	$ 8.61	$ 5.41	$ 5.50	$ 4.88	$ 3.08
	1998B	**SQUARE** tray		10	8.03	7.09	4.73	4.58	4.05	2.69
					acid-resisting enamel		regular enamel	acid-resisting enamel		regular enamel
					color	white	white	color	white	white
flat rim sinks (less fittings)	2017	**SONORA** double compartment	32x18	100		$42.58			$24.27	
			32x20	103		$42.58			24.27	
	2020	**SABINA** end outlet, 6" deep	30x18	69		25.04			14.27	
	2021	**SEAFORD** center outlet, 6" deep	24x18	60		22.31			12.72	
			24x20	65		23.47			13.38	
			30x18	69		25.04			14.27	
	2110	**STRATTON** single compartment	24x21	70	$29.09	26.13		$16.58	14.91	
			30x21	90	34.23	30.87		19.51	17.60	
	2115	**SHELTON** double compartment	32x21	100	41.00	36.96		23.40	21.06	
			42x21	130	65.68	59.16		37.46	33.72	
		note: for special sink drillings, add per hole					$2.05			$1.17

FORM 120

BRIGGS | BEAUTYWARE

JOBBER BULLETIN

NO. 2-63

BRIGGS MANUFACTURING COMPANY • 8000 EAST 13 MILE ROAD • WARREN, MICHIGAN

Subject: POTTERY PRICE INCREASE Date: 2/1/63

Effective this date, prices on chinaware listed on Jobbers Bulletin 7-62, dated June 15, 1962, will be revised as follows:

	WHITE	COLOR
B-6421	$19.50	$24.40
B-6422	21.25	26.55
B-6423	21.50	26.90
B-6425	25.00	31.25
B-6432	17.90	22.40
B-3302	7.90	9.90
B-3312	9.80	12.25

The above prices will apply on new orders for truckload or carload delivery. Other china items may be combined with the above list to make up weight.

We reserve the right to withdraw these prices without notice.

We have added one new item to this list - our B-6425 Prince Elongated Closet Combination.

General Terms, Conditions of Sales and Freight Allowances will apply.

BRIGGS MANUFACTURING COMPANY

/ew

Exhibit D-21

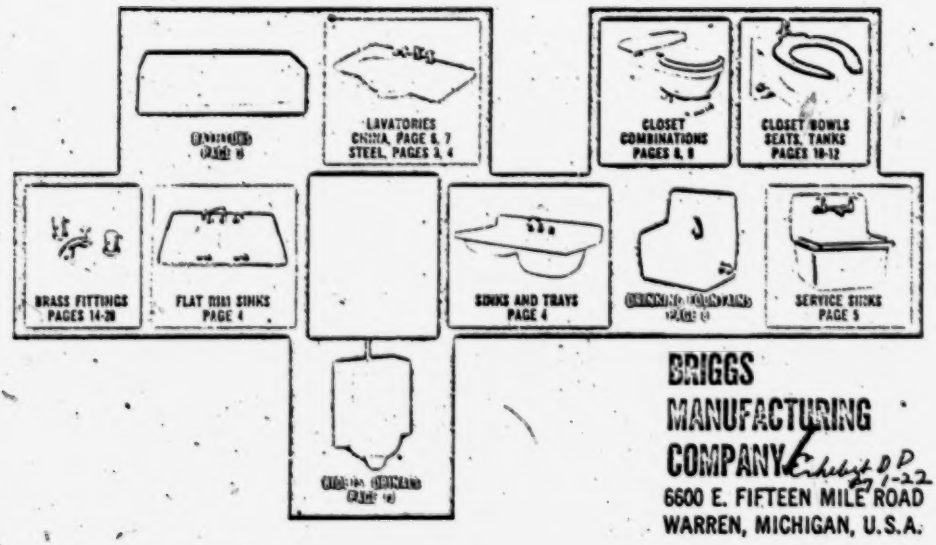
2/1/63 VC + 7% + 10% + 5% Brass + + Chrome Steel (B-306-2807) + L/L

APRIL 30
1962
WN-5
(FOR CATALOG
L-REV.)

BRIGGS
BEAUTYWARE

WHOLESALERS' PRICE LIST

APPLYING TO CATALOG L-REV.



BRIGGS
MANUFACTURING
COMPANY
6600 E. FIFTEEN MILE ROAD
WARREN, MICHIGAN, U.S.A.

720

VITREOUS CHINA

BRIGGS BEAUTYWARE

Model No.	DESCRIPTION	Size	Approx. Ship. Wt. Lbs.	Suggested Consumer Price Ea. White	Suggested Consumer Price Ea. Color	Wholesalers' Net Cost Price Each White	Wholesalers' Net Cost Price Each Color
	LAVATORIES (Less Supplies and Trap)						
B-3150-H	"CHAUCER" with T-8709 Fitting and B-3006 Knee Brackets	32x18"	58	$125.70	$139.55	$ 71.65	$ 79.54
B-3151-H	"CHAUCER" with T-8709 Fitting and B-3006 Knee Brackets	32x18"	58	125.70	139.55	71.65	79.54
	B-3080 Moulding for B-3150-H/B-3151-H.....Specify & Add			7.90	7.90	4.50	4.50
B-3160-H	"VALERY" with 2 T-8709 Fitting and 2 P-415, Holding Device	48x20"	100	156.30	168.30	89.09	95.92
B-3160-HB	"VALERY" with 2 B-3510 F.R. Lavatories, 2 T-8709 Fitting and 2 P-415 Holding Device	48x20"	136	195.00	216.65	111.15	123.50
B-3161-HB	Same as B-3160-HB except White Slab & Colored Lavatories	48x20"	136		204.70		116.75
B-3162-HB	Same as B-3160-HB except Colored Slab & White Lavatories	48x20"	136		207.00		117.98
	P-415 Holding Device for "VALERY", Only 1 Set			.70	.70	.40	.40
B-3212-HS	"WHITTIER" with T-8715-S Fitting	19x17"	42	53.40	58.45	30.45	33.32
B-3213-HS	"WHITTIER" with T-8715-S Fitting, for Concealed Arm	19x17"	42	56.90	61.95	32.45	35.32
B-3214-HS	"WHITTIER" with T-8715-S Fitting, for Exposed Arms	19x17"	42	53.40	58.45	30.45	33.32
B-3252-HS	"WHITTIER" with T-8715-S Fitting	22x18"	49	63.50	70.05	36.21	39.93
B-3253-HS	"WHITTIER" with T-8715-S Fitting, for Concealed Arm	22x18"	49	67.05	73.55	38.21	41.93
B-3254-HS	"WHITTIER" with T-8715-S Fitting, for Exposed Arm	22x18"	49	63.50	70.05	36.21	39.93
B-3282-HS	"WHITTIER" with T-8715-S Fitting	22x14"	45	54.10	59.20	30.84	33.76
B-3302	"WHITMAN" 4" Centers, less Fitting	19x17"	33	16.75	20.95	9.55	11.95
B-3312	"WHITMAN" 4" Centers, less Fitting	20x18"	38	19.70	24.70	11.23	14.08
B-3313	"WHITMAN" 4" Centers, for Concealed Arms, less Fitting	20x18"	38	23.95	29.05	13.64	16.55
B-3314	"WHITMAN" 4" Centers, for Exposed Arm, less Fitting	20x18"	38	20.40	25.50	11.64	14.55
B-3352	"WHITMAN" 4" Centers, less Fitting	24x20"	51	40.65	46.75	23.16	26.64
B-3382	"WHITMAN" 4" Centers, less Fitting	18x15"	32	17.80	20.50	10.16	11.69
B-3400	"MILTON" 4" Centers, less Fitting	18x15"	30	25.00		14.25	
B-3401	"MILTON" 4" Centers, for Concealed Arms, less Fitting	18x15"	30	28.50		16.25	
B-3402	"MILTON" 4" Centers, for Exposed Arm, less Fitting	18x15"	30	25.00		14.25	
B-3405	"MILTON" 8" Centers, less Fitting	18x15"	30	25.00		14.25	
B-3406	"MILTON" 8" Centers, for Concealed Arms, less Fitting	18x15"	30	28.50		16.25	
B-3407	"MILTON" 8" Centers, for Exposed Arms, less Fitting	18x15"	30	25.00		14.25	
B-3411	"MILTON" 4" Centers, for Legs, less Fitting	20x18"	40	25.60	29.45	14.60	16.79
B-3412	"MILTON" 4" Centers, for Concealed Arms, less Fitting	20x18"	40	29.40	33.80	16.75	19.26
B-3413	"MILTON" 4" Centers, for Exposed Arms, less Fitting	20x18"	40	25.60	29.45	14.60	16.79
B-3414-L*	"MILTON" 4" Centers with China Leg, less Fitting	20x18"	50	35.15	40.45	20.04	23.05
B-3417	"MILTON" 8" Centers, for Legs, less Fitting	20x18"	40	25.60	29.45	14.60	16.79
B-3418	"MILTON" 8" Centers, for Concealed Arms, less Fitting	20x18"	40	29.40	33.80	16.75	19.26
B-3419	"MILTON" 8" Centers, for Exposed Arms, less Fitting	20x18"	40	25.60	29.45	14.60	16.79
B-3420-L*	"MILTON" 8" Centers with China Leg, less Fitting	20x18"	50	35.15	40.45	20.04	23.05
B-3421	"MILTON" Secretum Complete with Cover and Waste Fitting	20x18"	45	134.60		76.72	
B-3450	"MILTON" 4" Centers for Legs, less Fitting	24x20"	56	43.80	50.40	24.98	28.73
B-3451	"MILTON" 4" Centers for Concealed Arms, less Fitting	24x20"	56	47.60	54.75	27.13	31.21

* Furnished with China Leg to set Rim 31", 27" or 24" from floor—Specify height required.

BRIGGS

BEAUTYWARE

VITREOUS CHINA

Model No.	DESCRIPTION	Approx. Ship. Wt. Lbs.	Suggested Consumer Price Ea. White	Suggested Consumer Price Ea. Color	Wholesalers' Net Cost Price Each White	Wholesalers' Net Cost Price Each Color
	CLOSE COUPLED (Less Seat, with China Bolt Caps)					
B-6350	"KING" Round Front, Wall Hung, less China Bolt Caps	110	$105.95	$121.75	$ 60.40	$ 69.41
B-6404	"CARLTON" Round Front 12" R. L. with Anti-Syphon Float Valve	101	52.20	65.25	29.75	37.20
B-6405	"CARLTON" Elongated Front 12" R. L. with Anti-Syphon Float Valve	102	57.95	72.45	33.03	41.29
B-6421	"PRINCE" Round Front 12" R. L.	100	40.35	50.35	23.00	28.70
B-6422	"PRINCE" Round Front 14" R. L.	100	40.35	50.35	23.00	28.70
B-6423	"PRINCE" Round Front 10" R. L.	100	40.35	50.35	23.00	28.70
B-6425	"PRINCE" Elongated Front 12" R. L.	101	48.25	60.35	27.51	34.39
B-6432	"DUKE" Round Front 12" R. L. with 2 Floor Screws and Washers	93	37.90	47.35	21.59	26.98
B-6432-I	"DUKE" Round Front, Integral Seat, 12" R. L., with 2 Floor Screws	93	44.35		25.27	
B-6435	"COUNT" Round Front 12" R. L. less Floor Screws	86	35.80	44.80	20.41	25.55
B-6439	"AMBASSADOR" Round Front 12" R. L.	101	38.25	47.90	21.82	27.30
	WITH WALL HUNG TANK (Less Seat, with China Bolt Caps)					
B-6406	"CARLTON" Elongated Front, 11½" R. L.	108	67.95	78.25	38.74	44.59
B-6407	"CARLTON" Round Front, 11½" R. L.	107	62.70	72.10	35.75	41.11
B-6413	"SCOUT" Elongated Front, 11½" R. L.	108	69.75	80.25	39.77	45.73
B-6414	"SCOUT" Round Front, 11½" R. L.	107	64.40	74.05	36.71	42.22
B-6416	"TOT" Round Front, 12½" R. L.	100	66.90	76.90	38.12	43.84
B-6441	"EARL" Round Front, 14" R. L.	88	45.90		26.15	
B-6442	"EARL" Round Front, 12" R. L.	91	45.90		26.15	
B-6443	"EARL" Round Front, 10" R. L.	97	51.20		29.18	
B-6465	"BARON" Round Front, Integral Seat, 14" R. L.	97	50.70		28.91	
B-6470	"KNIGHT" Round Front, 12" R. L.	104	53.05		30.23	
	Anti-Syphon Float Valve ..... Specify and Add		1.30	1.30	.75	.75
	Tank Cover Locking Device ..... Specify and Add		3.20	3.20	1.83	1.83

KOHLER of KOHLER

July 31, 1963

KOHLER OF KOHLER
PLUMBING FIXTURE PRICES
SYMBOL ST-731
EFFECTIVE JULY 31, 1963

ENAMELED CAST IRON

Plate Number	Description	Size	NET PRICES White A.R.	Color A.R.
K-515 K-516	DYNAMETRIC recess bath, less fittings	5-ft.	$53.50	$66.25
K-725 K-726	MINOCQUA recess bath, less fittings	5-ft.	44.50	48.95

VITREOUS CHINA

Plate Number	Description	Size	NET PRICES White	Color
	LAVATORIES			
K-1746	CHESAPEAKE lavatory with hanger, less fittings	19x17"	$ 8.00	$ 9.90
		20x18"	9.80	12.25
	CLOSE COUPLED CLOSETS with bolt caps less supply and seat			
K-3712-EB	WELLWORTH - ELONGATED		25.20	31.50
K-3712-PB	WELLWORTH, 12" roughing-in		19.30	24.40
K-3714-PB	WELLWORTH, 14" roughing-in		21.25	26.55
K-3716-PB	WELLWORTH, 10" roughing-in		21.50	26.90
K-3725-PB	TRYLON, 12" roughing-in		17.95	22.40
	If with ANTI-SIPHON float valve, add		.50	.50

Edward E

713

KOHLER
OF
KOHLER

Plumbing Fixtures

K-63-4
PRICE LIST
JULY 31, 1963

Exhibit EE
RP 1-49

744

KOHLER
Plumbing Fixtures

NOTICE

This price book is not an offer to sell to any person who possesses it, nor to anyone else, the goods listed herein at the prices shown.

K63-4 **LIST PRICES** apply to Kohler Plumbing Fixtures illustrated in Catalog K63, supersede previous Price Lists and quotations and are subject to change without notice. They are the basis for distributors' discounts and are **not intended as resale prices.**

These prices do not include local freight or cartage.

TAXES. Any manufacturer's or sales tax applicable thereto will be added to the prices and terms.

SHIPPING WEIGHTS are approximate, and apply to Fixtures, Seats and Fittings as cataloged. Weights are not guaranteed, but are shown only for customers' convenience.

CONTINGENCIES. We are not responsible for any delays which are beyond our control, such as those caused by fires, strikes, delays in transportation, or other contingencies.

DESIGN CHANGES. We reserve the right to make revisions without notice in the design of fixtures or in packaging unless this right has specifically been waived at the time the order is accepted.

SPECIAL FIXTURES. Cancellations or changes in specifications will not be accepted after production has begun on orders for colored fixtures, specially drilled items, all fixtures having unusual features requiring extra supervision in our factories, and fixtures, fittings and parts produced for us by other manufacturers.

RETURNED MERCHANDISE. Salable merchandise, which is shipped according to customers' specification, cannot be returned for credit.

WARRANTY. Kohler plumbing fixtures and fittings, manufactured and inspected with care by experienced workmen, are warranted free of manufacturing defects in accordance with Commercial Standards published by the United States Department of Commerce.

Replacements will be furnished where Kohler Co. inspection discloses any such defects occurring in normal usage within five years after installation. Claims will not be allowed for installation or consequential damages, nor for goods of other manufacture.

This is the complete Kohler Co. warranty. We disclaim any other warranties or representations.

DAMAGE IN TRANSIT. Every reasonable precaution is taken against breakage or other damage in transit. As all goods are shipped f.o.b. Kohler, Wis. or Spartanburg, S.C. at buyer's risk, our responsibility ceases upon delivery of the material in good order to the carrier. Claims against the carriers are to be filed by the buyer.

ACKNOWLEDGMENT OF ORDERS. Our acknowledgments should be checked promptly and any questions pertaining to our interpretation of any item should be called to our attention.

KOHLER CO.
KOHLER, WISCONSIN, U. S. A.

KOHLER
Plumbing Fixtures

CATALOG K63 Page	Plate Number	DESCRIPTION	Size	PRICES A-R Enamel White	PRICES A-R Enamel Color	App. Ship. Wt.
		ENAMELED CAST IRON BATHS **LESS FITTINGS**				
Not Illus.	K-255 K-256	METRIC—Recess Bath	5⅓-ft.	$192.90	$214.10	418
12	K-515	DYNAMETRIC—Recess Bath	4⅓-ft.	125.95	139.95	310
13	K-516	DYNAMETRIC—Recess Bath	5- ft.	119.05	132.25	360
		DYNAMETRIC—Recess Bath	5⅓-ft.	151.65	168.50	405
15	K-521	DYNAMETRIC—Corner Bath				
17	K-524	DYNAMETRIC—Corner Bath	5- ft.	149.35	165.95	410
17	K-561 K-564	COSMOPOLITAN—Corner Bath	4⅓-ft.	147.70	161.90	380
18	K-725	MINOCQUA—Recess Bench Bath	4⅓-ft.	93.95	100.10	280
19	K-726	MINOCQUA—Recess Bench Bath	5- ft.	91.20	95.95	310
		MAYFLOWER BATHS **WITH GALAXY FITTINGS**				
20	K-815-AL K-816-AL	MAYFLOWER—Recess Bath With K-6927 Fitting, K-7176 Pop-up Drain, Wall Grip Rail, Curtain Rod and Hook	48x44"	250.35	270.70	404
		For Brushed-Finish Chrome Fittings—Add		29.70	29.70	
20	K-815-FL K-816-FL	MAYFLOWER—Recess Bath With K-6925 Fitting, K-7176 Pop-up Drain, Wall Grip Rail, Curtain Rod and Hook	48x44"	240.60	260.95	402
		For Brushed-Finish Chrome Fittings—Add		25.85	25.85	
20	K-815 K-816	MAYFLOWER—Recess Bath, Less Fittings	48x44"	183.20	203.55	380
21	K-821-AL K-824-AL	MAYFLOWER—Corner Bath With K-6927 Fitting, K-7176 Pop-up Drain, Wall Grip Rail, Curtain Rod and Hook	48x44"	289.75	313.55	416
		For Brushed-Finish Chrome Fittings—Add		36.15	36.15	
21	K-821-FL K-824-FL	MAYFLOWER—Corner Bath With K-6925 Fitting, K-7176 Pop-up Drain, Wall Grip Rail, Curtain Rod and Hook	48x44"	280.00	303.80	415
		For Brushed-Finish Chrome Fittings—Add		32.30	32.30	
21	K-821 K-824	MAYFLOWER—Corner Bath, Less Fittings	48x44"	213.95	237.75	390

CATALOG K63 Page	Plate Number	DESCRIPTION	Size	PRICES White	PRICES Color	App. Ship. Wt.
		VITREOUS CHINA SHELF LAVATORIES				
		WITH FITTING, LESS TOWEL BARS, SUPPLIES AND TRAP (Continued)				
28	*K-1640-B	STRAND—With K-7450 Constellation Fittings, K-9582 Legs	20x14"	$ 70.00	$ 87.90	48
			26x15½"	84.30	109.35	58
New	K-1640-BQ	STRAND—With K-10320 Aquaric Fitting, K-9582 Legs	20x14"	65.35	83.25	48
			26x15½"	79.65	104.70	58
28	*K-1645-B	STRAND—With K-7450 Constellation Fitting	20x14"	58.55	76.45	43
			26x15½"	72.85	97.90	54
New	K-1645-BQ	STRAND—With K-10320 Aquaric Fitting	20x14"	53.90	71.80	43
			20x15½"	68.20	93.25	54
29	*K-1680-B	ROCKPORT—With K-7450 Constellation Fitting	17x17"	64.35	85.15	48
New	K-1680-BQ	ROCKPORT—With K-10320 Aquaric Fitting	17x17"	59.70	0.50	48
		*For STRAND and ROCKPORT Lavatories Specified With:				
		K-6970 Galaxy Polished Chrome Fitting—Add		7.10	7.10	
		K-6970-G Galaxy Brushed Chrome Fitting—Add		18.70	18.70	
		Self Closing Fittings—Add		8.80	8.80	
		SHELF DENTAL LAVATORIES				
29	K-1702-B	RINSE—With K-7466 Constellation Fitting	14x14"	59.30	79.20	31
29	K-1712-B	WALCOT—With K-7460 Constellation Fitting	14x14"	40.05	51.45	26
		*If above are fitted with Galaxy Fitting:—				
		Polished Chrome Fitting—Add		7.10	7.10	
		Brushed Chrome Fitting—Add		18.70	18.70	
		LEDGE LAVATORIES				
		LESS FITTING AND TOWEL BARS				
30	K-1736	CHESAPEAKE—With K-9582 Legs—dr. 10" c-c	30x22"	82.80	118.50	90
			19x17"	29.35	33.85	40
30	K-1741	CHESAPEAKE—With K-9582 Legs—dr. 4" c-c	20x18"	32.60	37.90	45
			24x20"	61.05	85.85	51
			18x15"	18.95	23.70	30
30	K-1746	CHESAPEAKE—With Hanger—dr. 4" c-c	19x17"	17.90	22.40	35
			20x18"	21.15	26.45	40

KOHLER
Plumbing Fixtures

Closets

CATALOG No. Page	Plate Number	DESCRIPTION	PRICES White	PRICES Color	App. Ship. Wt.
		ONE-PIECE CLOSETS			
		LESS SUPPLY AND LESS STOP			
51	K-3590-EB	CHAMPLAIN—Elongated, with K-4690 plain seat and cover with air freshener unit and removable hinge feature	$153.75	$209.35	122
		CHAMPLAIN—Elongated, with alternate seats:—			
		K-4692-J Pearlescent Closed Front Seat and Cover	153.75	209.35	122
		K-4696-P Plain Open Front Seat and Cover	148.35	204.20	122
		K-4696-J Pearlescent Open Front Seat and Cover	153.75	209.35	122
		K-4697-P Plain Open Front Seat Less Cover	146.45	.....	120
		If Champlain Closets are Specified with—			
		K-7650 ⅜" I.P.S. Angle Supply with Stop—Add	4.40	4.40	
		K-7651 ⅜" Angle Supply with Stop and Annealed Vertical Tube—Add	3.80	3.80	
52	K-3605-EB	PLACID—Elongated, Less Seat	118.80	169.75	134
		CLOSE-COUPLED CLOSETS			
		LESS SUPPLY AND LESS STOP			
53	K-3640-PB	CAYUGA—Round Front Wall Hanging Closet, Less Seat	74.70	93.10	139
New	K-3642-PB	CAYUGA—Round Front Wall Hanging closet Less Seat (Closet Support is Not Included with K-3640-PB and K-3642-PB)	69.95	88.35	139
54	K-3675-EB	BOLTON—Elongated, Less Seat	77.90	109.35	132
54	K-3675-PB	BOLTON—Round Front, Less Seat	73.50	102.45	131
55	K-3712-EB	WELLWORTH—Elongated, 12" Roughing-in, Less Seat	52.05	65.45	110
55	K-3712-PB	WELLWORTH—Round Front, 12" Roughing-in			
55	K-3714-PB	WELLWORTH—Round Front, 14" Roughing-in } Less Seat	43.35	54.10	106
55	K-3716-PB	WELLWORTH—Round Front, 10" Rough-in, Less Seat	43.75	54.80	108
56	K-3725-PB	TRYLON—Round Front, Less Seat	40.75	50.90	106
56	K-3729-PB	TRYLON—Integral Seat	45.25	.....	106
		SEPARATE BOWL AND TANK CLOSETS			
		LESS SUPPLY AND LESS STOP			
59	K-4312-EB	JUVENILE—Elongated, Less Seat	75.30	.....	139
59	K-4312-PB	JUVENILE—Round Front, Less Seat	69.55	.....	138
59	K-4318-EB	PRIMARY—Elongated, Less Seat	67.10	.....	107
		If K-3605-EB thru K-4318-EB Closets are specified with K-7638 Angle Supply and Stop—Add	3.80	3.80	
		If K-3642-PB and K-3712-EB thru K-4318-EB Closets are specified with Anti-siphon Float Valve—Add	2.15	2.15	
		FOR FLUSH VALVE COMBINATION:—See Prices of Separate Bowls—Pages 15 and 16 and "Metro" Flush Valves on pages 40 and 41.			
		FOR SEAT PRICES—See page 18.			
		NOTE:—Prices for all Closet Combinations do not include floor bolts. They are part of floor flange assembly or can be ordered separately.			

GRANDE

WHOLESALERS' PRICE BULLETIN

Issued by: PEAC Group - Johnstown, Pa. Bulletin No. PW3-61
Supersedes and cancels Bulletin No. Special Price Bulletin PW3-59 Dated August 30, 1963
Enclosures: References:

Subject: SPECIAL COMPETITIVE PRICES - EFFECTIVE AUGUST 30, 1963

Terms and Conditions:

1. Regular freight, cash discount and other general terms and conditions outlined in current PW Price Book apply, except that no price protection is available at these prices.
2. These prices are for shipment at factory convenience. No delayed delivery orders will be accepted.
3. No less than truckload or carload orders will be accepted on each commodity (factory or carload), although items other than those listed below may be shipped mixed to make weight.
4. These unprotected prices do not supersede wholesaler net prices on these items as listed in current price book and supplement.
5. We reserve the right to limit quantities.
6. Prices subject to withdrawal without notice. Only orders postmarked as being in the mail to us prior to the effective date of withdrawal will be accepted on basis of prices noted below.
7. Prices are subject to the addition of any applicable manufacturers' or sales tax.

	Wholesalers Net Price Each	
1-330 20x18" Yorkshire Lavatory, 1/[illegible]	$9.00	[illegible]
1-320 19x17" Westmont Lavatory, 1/[illegible]	7.90	8.50
3-130-10 Oxford, 10" [illegible], 1/[illegible]	21.50	23.00
3-130-12 Oxford, 12" [illegible], 1/[illegible]	20.00	21.50
3-130-15 Oxford, 15" [illegible], 1/[illegible]	21.25	23.00
3-[illegible] Oxford Elongated Closet, 1/[illegible]	[illegible].00	24.75
3-175 Harvard Closet, 1/[illegible]	17.00	[illegible].00
For semi-siphon wall [illegible] on closets add	.50	.50

	A.B. [illegible]	
2-78 5' Premier Recess Bath, less [illegible]	$[illegible].00	[illegible].00
2-80 5' Crittenden Recess Bath, less [illegible]	50.00	46.00
2-100 5' Fairfax Recess Bath, less fittings	44.50	43.00

Exhibit P-20

CRANE

WHOLESALER
NET PRICE BOOK
PN-14

CONFIRMS PRICE CHANGES EFFECTIVE JULY 15, 1963

JULY 31, 1963

PLUMBING FIXTURES AND FITTINGS

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CRANE CO.

P. O. BOX 780 JOHNSTOWN, PA.

Exhibit F F
A91-46
795

PRINTED IN U. S. A.

238-135 O - 66 - 5

LAVATORIES—VITREOUS CHINA

Catalog Number	DESCRIPTION	Size Inches	Approx Shpg Wt Pounds	Suggested Consumer Price		Wholesalers Net Price Each	
				White	Color	White	Color
	VITREOUS CHINA LAVATORIES—Cont'd						
	Less All Fittings, Unless Otherwise Described.						
*1-235-2	CRESCENT—Same except with 8-1032A Supply and Waste Fitting	36x18½	95	135.68	182.05	77.09	103.44
*1-235-20	CRESCENT—Same except with 8-2020A Supply and Waste Fitting	36x18½	95	127.09	173.47	72.21	98.56
*1-235-22	CRESCENT—Same except with 8-2024A Supply and Waste Fitting	36x18½	95	128.81	175.19	73.19	99.54
†1-235	CRESCENT—Lavatory Cabinet with Exterior, Front and Sides Surfaced with "White Sequin" #28-SE-1 Formica, 2 Legs and 2 Handles, Brush Finish Chrome Plate	34x17⅞	....	71.10	.....	40.40	.....
	†F.O.B. Chicago—No Freight Allowance.						
1-270-1	ELAYNE—with 8-1008 Supply and Waste Fitting	27x20	63	122.36	152.31	69.52	86.54
1-270-2	ELAYNE—with 8-1009 Supply and Waste Fitting	27x20	63	122.36	152.31	69.52	86.54
1-272-B 1-272-S 1-272-V	CROWN—Round with Oval Basin	18x18	28	30.96	46.43	17.59	26.38
1-275-1	MARCIA—with 8-1004 Supply and Waste Fitting	24x21	60	115.39	144.00	65.56	81.82
1-275-2	MARCIA—with 8-1006 Supply and Waste Fitting	24x21	60	115.39	144.00	65.56	81.82
1-277-1	CELESTE—with 8-1040A Supply and Waste Fitting	24x21	60	129.71	163.59	73.70	92.95
1-277-2	CELESTE—with 8-1042A Supply and Waste Fitting	24x21	60	129.71	163.59	73.70	92.95
1-278-V 1-278-S	CELETTE—Ware Only	20x18	35	26.52	39.78	15.07	22.60
1-282-B 1-282-S 1-282-V	WESTLAND—Ware Only	20x19	35	26.52	39.78	15.07	22.60
1-282-1	WESTLAND—with 8-1008 Supply and Waste Fitting	20x19	44	88.95	102.20	50.54	58.07
1-282-2	WESTLAND—with 8-1009 Supply and Waste Fitting	20x19	44	88.95	102.20	50.54	58.07
1-284-S 1-284-V	COUNTESS—Ware Only	20x17	36	28.44	37.29	16.16	21.19
1-300-V	YORKSHIRE—with Concealed Hangers and Screws	20x18	38	21.19	26.47	12.04	15.04
1-307	YORKSHIRE—with Concealed Hangers and Screws	20x18	38	24.64	30.75	14.00	17.47
1-311-V	PETITE—with Concealed Hangers and Screws	14x14	35	26.54	39.81	15.08	22.62
1-320-V	WESTMONT—with Concealed Hangers	19x17	33	17.99	22.51	10.22	12.79
	*If Less Aerator, Specify and ..... Deduct	.....	....	1.06	1.06	.60	.60

LAVATORIES—PORCELAIN ENAMELED CAST IRON

Catalog Number	DESCRIPTION	Size Inches	Approx Shpg Wt Pounds	Suggested Consumer Price White A.R.	Suggested Consumer Price Color A.R.	Wholesalers Net Price Each White A.R.	Wholesalers Net Price Each Color A.R.
	A.R. ENAMELED CAST IRON LAVATORIES Less All Fittings, Unless Otherwise Described.						
1-288-S 1-288-V	CHARLOTTE	20x18	40	20.28	25.34	11.52	14.40
1-288-B 1-294-S 1-294-V	APRIL	20x18 18x18	40 39	23.80 20.17	28.86 25.22	13.52 11.46	16.40 14.33
*1-455-20	NEUDAY—w/8-2010A Supply and Waste Fitting, Hanger	19x17	65	43.90	53.43	26.08	30.36
*1-455-22	NEUDAY—w/8-2014A Supply and Waste Fitting, Hanger	19x17	65	47.36	54.89	26.91	31.19
*1-455-30	NEUDAY—w/8-3000A Supply and Waste Fitting, Hanger	19x17	65	42.15	49.72	23.95	28.25
*1-455-34	NEUDAY—w/8-3010A Supply Fitting w/ chain and stopper, hangers	19x17	65	37.42	44.99	21.26	25.56
1-465-20	FAIRFAX—w/8-2012A Supply and Waste Fitting, Hanger	22x19	80	51.00	59.84	29.00	34.00
1-465-22	FAIRFAX—w/8-2016A Supply and Waste Fitting, Hanger	22x19	80	52.50	61.30	29.83	34.83
1-465-30	FAIRFAX—w/8-3002A Supply and Waste Fitting, Hanger	22x19	80	47.17	55.97	26.80	31.80
1-465-34	FAIRFAX—w/8-3010A Supply Fitting w/ chain and stopper, hanger	22x19	80	42.43	51.23	24.11	29.11
	*If less aerator, specify and deduct			1.06	1.06	.60	.60
1-506-S	FERMONT—w/back, Concealed) Hanger)	19x17	42	23.55	29.44	13.38	16.73
1-506-V	)	20x18	52	26.70	33.37	15.17	18.96

CAST IRON LAVATORY VARIATIONS

For drillings in slab or back other than shown in catalog ..... Per Hole 1.50
Painting underside wall hung lavatories ..... Per Lavatory .50

LAVATORIES—PORCELAIN ENAMELED STEEL

Catalog Number	DESCRIPTION	Size Inches	Approx Shpg Wt Pounds	Suggested Consumer Price White A.R.	Suggested Consumer Price Color A.R.	Wholesalers Net Price Each White A.R.	Wholesalers Net Price Each Color A.R.
1-290	STAFFORD—Countertop, Less Fittings	19⅛x15⅝	12	14.15	15.56	8.04	8.84
1-293	STELLAR—Countertop, Double Bowl, Less Fittings	20x18 42x18	18 43	15.08 36.82	16.60 40.48	8.57 20.92	9.43 23.00
1-299	STEVENS—Countertop, Round, Less Fittings	18x18	17	15.08	16.60	8.57	9.43
1-472	STEPHANIE—Shelf Back, Less Fittings	20x18	25	24.32	26.77	13.82	15.21

BATHS—PORCELAIN ENAMELED CAST IRON

	LESS FITTINGS						
2-42 2-50	NEU-TARNIA—Corner NEU-VOGUE—Recess Receptor	49¾x49¾ 48x46	545 460	276.76 229.45	307.56 255.06	157.25 130.37	174.75 144.92
2-56	FATHOM—Recess	6'-0"	540	230.47	255.99	130.95	145.45
2-60	CRITERION—Corner	5'-0"	445	150.25	166.97	85.37	94.87
2-78	PREMIER—Recess	5'-0"	360	118.60	136.42	67.89	77.51
2-80	CRITERION—Recess	5'-0"	355	118.60	136.42	67.89	77.51
		5'-6"	420	153.58	170.68	87.26	96.98

BATHS—PORCELAIN ENAMELED CAST IRON

Catalog Number	DESCRIPTION	Size Inches	Approx Shpg Wt Pounds	Suggested Consumer Price White A.B.	Suggested Consumer Price Color A.B.	Wholesalers Net Price Each White A.B.	Wholesalers Net Price Each Color A.B.
2-93	NEUDAY—Recess	4'-6"	310	99.07	105.58	56.29	59.99
2-100	FAIRFAX—Recess	5'-0"	315	91.27	96.10	51.87	54.60
*2-560	MARC ANTONY—Recess	6'-0"	498	269.19	294.81	152.95	167.45
*2-600	CAESAR—Corner	5'-0"	403	185.45	202.17	105.37	114.87
*2-780	CENTURION—Recess	5'-0"	326	145.00	162.82	82.89	92.51

*Made to order basis only and Prices are based on tub aprons ranging from 4 to 8". Orders Must Specify Apron Height Required.

BATHS—DURACLAY

2-130	LaHOMA—Recess Receptor	42x31	270	152.10	228.13	86.42	129.62

BATHS—PORCELAIN ENAMELED STEEL

Catalog Number	DESCRIPTION	Size Inches	Approx Shpg Wt Pounds	Suggested Consumer Price White A.B.	Suggested Consumer Price Color A.B.	Wholesalers Net Price Each White A.B.	Wholesalers Net Price Each Color A.B.
	LESS FITTINGS						
2-155	OMEGA—Corner	5'-0"	128	99.49	109.44	56.53	62.18
2-160	OLYMPIC—Recess	4'-6"	114	75.31	82.84	42.79	47.07
2-161	OAKMONT—Recess	5'-0"	120	78.43	86.26	44.56	49.01
2-163	OTTAWA—Recess	5'-0"	115	74.50	81.95	42.33	46.56
2-183	CRESTMONT—Free Standing, Double Apron	5'-0"	204	12.46	123.71	63.90	70.29
2-185	CRESTMONT—Recess Receptor	42x30¾	80	69.17	76.08	39.30	43.23
	For Slip Proof Bottom Surface on Steel Tubs Add			8.80	8.80	5.00	5.00
	Leg Supports for Oakmont or Ottawa Tubs can be furnished on Special Order			†	†	†	†

CLOSETS—VITREOUS CHINA

Catalog Number	DESCRIPTION	Size	Approx Shpg Wt Pounds	Suggested Consumer Price White	Suggested Consumer Price Color	Wholesalers Net Price Each White	Wholesalers Net Price Each Color
	ONE-PIECE CLOSETS						
3-112	AMBASSADOR—Elongated, Closet with Bolt Caps, Supply, Stop, Escutcheon and 3-887 Teleseat		130	150.44	213.79	85.48	121.47
	CLOSE-COUPLED CLOSETS With Bolt Caps, Less Supply and Stop						
3-102	CRITERION—Elongated, with 3-102 Seat with Telescopic Cover		174	157.48	234.27	89.48	133.11
3-104	CRITERION—Elongated, with Seat (Sahara Tank)		183	166.09	239.01	94.37	135.80
3-113	REXMONT—Regular Rim, Less Seat		130	71.10	88.88	40.40	50.50
3-126	DREXEL—Regular Rim, Less Seat		111	70.84	98.98	40.25	56.24
	For Anti-Siphon Float Valve Add			1.94	1.94	1.10	1.10

† Prices on Application.

CLOSETS—VITREOUS CHINA

Catalog Number	DESCRIPTION	Size	Approx Shpg Wt Pounds	Suggested Consumer Price		Wholesalers Net Price Each	
				White	Color	White	Color
	CLOSE-COUPLED CLOSETS With Bolt Caps, Less Supply and Stop						
3-127	DREXEL—Elongated Rim, Less Seat		114	77.16	103.36	43.84	60.43
3-128	DREXEL—Regular Rim, Less Seat (Sahara Tank)		120	90.06	119.70	51.17	68.01
3-129	DREXEL—Elongated Rim, Less Seat (Sahara Tank)		123	96.36	127.07	54.75	72.20
3-140-10	OXFORD—10" Rough—Regular Rim L/Seat		97	43.84	54.81	24.91	31.14
3-140	OXFORD—12" Rough—Regular Rim L/Seat		97	43.42	54.24	24.67	30.82
3-140-14	OXFORD—14" Rough—Regular Rim L/Seat		97	43.42	54.24	24.67	30.82
3-141	OXFORD—Elongated L/Seat		109	52.45	65.54	29.80	37.24
3-142	OXFORD—Regular Rim, Less Seat (Sahara Tank)		112	80.15	102.27	45.54	58.21
3-175	HARVARD—Regular Rim, Less Seat		94	40.87	51.04	23.22	29.00
3-177	HARVARD—Regular Rim, Less Seat (Sahara Tank)		111	75.72	96.20	43.02	54.66
3-167	PETITE—Regular Rim, Less Seat		86	55.60	68.64	31.59	39.00
3-284	HY-SAN—Close-Coupled, with Tank and Trim, Less Supply Pipe, Stop and Bolt Caps		143	115.26	†	65.49	†
	For Anti-Siphon Float Valve ..... Add		.....	1.94	1.94	1.10	1.10
	SEPARATE BOWL AND TANK CLOSETS						
3-115	WALSAN—Regular Rim, Bowl, with 3-886 Teleseat		68	87.00	110.11	49.43	62.56
3-115	Concealed Tank and Access Wall Panel, for Walsan Closet, Less Carrier Fitting Use 3-1200 Carrier Fitting for 3-115 WALSAN Closet. For Prices and Proper Index Number, Refer to J. A. Zurn's Current Price Sheet.		35	86.06	86.06	48.90	48.90
3-200	SAXONET—Regular Rim—2" Back Spud, Bowl Only		38	18.52	27.77	10.52	15.78
3-220	TROY—Elongated Rim—2" Back Spud, Bowl Only		45	30.84	†	17.52	†
3-221	TROY—Regular Rim—2" Back Spud, Bowl Only Low Tanks for above bowls—refer to 3-560		44	26.08	†	14.82	†
3-204	SANTON—Elongated Rim—2" Back Spud		75	44.56	†	25.32	†
3-206	SANTON—Regular Rim—2" Top Spud		57	32.49	48.73	18.46	27.69
3-207	SANTON—Elongated Rim—2" Top Spud		58	38.02	57.04	21.60	32.41
3-208	SANTON JR.—Elongated Rim—2" Top Spud		64	40.60	†	23.07	†
3-209	SANTON JR.—Regular Rim—2" Top Spud		60	35.23	†	20.02	†
3-210	BABY—Regular Rim—2" Top Spud		51	38.91	†	22.11	†
3-215	SANETO—Elongated Rim—2" Top Spud		58	38.02	57.04	21.60	32.41
3-216	SANETO—Regular Rim—2" Top Spud Low Tanks for above bowls—refer to 3-570		57	34.06	51.08	19.35	29.02

† Prices on Application.

RX 16

UNIVERSAL-RUNDLE CORP.
INTER-ORGANIZATION CORRESPONDENCE

DATE Nov. 28 1956

TO ALL DISTRICT SALES MANAGERS FROM W. B. KARINER

AT AT NEW CASTLE OFFICE

SUBJECT: CAST IRON PRICES

This will confirm our phone conversation and teletype in which we offered you a special discount of 10% from wholesalers' net on the following fixtures:

Tubs:

4 1/2'-5'-5 1/2'- Corner 16" Tubs, white and color.
14" - No change.

Sinks:

All - white and color.

Lavatories:

2204, 2212, 2213, white and color.

Terms:

1. Price effective November 29 until further notice. Subject to immediate withdrawal.
2. Price applies to truckload or carload quantities only.
3. Orders accepted for immediate delivery only.
4. Prices not applicable to projects.

We do not feel that we can generally give the above discounts on projects and protect the price for a period of 12 months. We will, however, continue to give individual consideration to project quotations.

Offer judiciously.

/s/ WBK
W. B. KARINER

WBK:cb
cc: Stanley S. Backner
J. M. Patterson
F. H. Cornelius
G. D. Pence
H. P. Wasgolis

FEDERAL TRADE COMMISSION
Docket No. 8070 Respondent
Exhibit No. 16
In the Matter of: Universal-Rundle
Date: 11/1/62 Witness _____
Reporter _____ 22[illegible]

VRX 17

[illegible] - APRIL 10, 1957

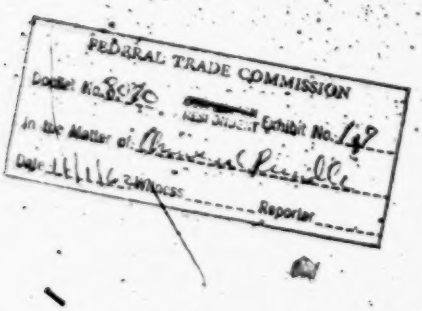
[illegible] IMMEDIATELY, THIS WILL AUTHORIZE YOU TO OFFER YOUR CUSTOMERS [illegible] ITEMS AT THE SPECIAL PRICES INDICATED.

		WHITE	COLOR
[illegible]	CARDINAL CLOSET, REGULAR BALLCOCK	21.45	25.85
[illegible]	CASTLE CLOSET, REGULAR BALLCOCK	21.45	25.85
[illegible]	CARMEN 20 X 18 LAV	10.50	13.10

[illegible] OFFER IS SUBJECT TO FOLLOWING CONDITIONS.

1. [illegible] MAY BE WITHDRAWN AT ANY TIME WITHOUT NOTICE.
2. ORDERS ACCEPTED FOR IMMEDIATE SHIPMENT ONLY.
3. [illegible] INCLUDED IN ORDERS OF TRUCKLOAD OR CARLOAD QUANTITIES.
4. REGULAR FREIGHT AND TRADE TERMS APPLY.

[illegible] H. PATTERSON



F. H. Cornelius
RX-19

SPECIAL PRICE OR DISCOUNT APPROVAL
Form No. 1.211 - 9/57

FEDERAL TRADE COMMISSION

Part ALL DISTRICTS | Docket No. 5[illegible] | Special Price Approval No. A11-5-57
In the Matter of [illegible] | Effective Date 7-15-57
Date 11/11/6[illegible] Witness _____ Reporter | Expiration Date [illegible]

DATE	SUPERCEDES APPROVAL		APPLIES TO			
	Number	Effective Date	District Sales Mgr.	Territory	Customer Code No.	U/I Code No.
7-15-57	-	-	-	-	-	-

Reason for Special Price or Discount: To meet competitive special cast iron prices only where necessary to insure our sustaining cast iron fixture business.

Type of Special Price or Discount: Authorized to offer the following prices where it is necessary to compete on cast iron:

Product No.	Item	White Regular	White A/R	Color
2110-11	Master Meadow	51.12	57.45	65.75
2204	Lodgemaster	20.33	22.09	23.80
2203	Lodgemaster	22.67	24.78	26.85
2352	Layton	-	18.76	20.83

Orders must be for immediate release.

Prices subject to withdrawal without notice.

Prices to be used only where necessary to be competitive.

Use only for T/L or C/L quantities.

To be shipped at convenience of Cast Iron Plant.

"Confirming 'phone calls of 7-15-57"

Special Remarks: To be used by District Sales Managers when, in their judgment, they deem it necessary to compete.

SIGNED BY: W. Tennell
Sales Manager (or D. Signee)

Vice President, Sales (or Designee)

2257

SPECIAL PRICE OR DISCOUNT APPROVAL
Form No. 8.211 - 7/57

VRX-20

For: ALL DISTRICTS

Special Price Approval No.	
	7-15-57
Effective Date	
7-15-57	
Expiration Date	
[ ] INDEFINITE	

DATE	SUPERSEDES APPROVAL		APPLIES TO			
	Number	Effective Date	District Sales Mgr.	Territory	Customer Code No.	U/M Order No.
7-15-57	-	-	-	-	-	-

Reason for Special Price or Discount: To meet all major competitors' prices.

Type of Special Price or Discount: Authorized to quote following prices on orders of carload quantities:

		White	Color
6050-51	Giro Steel Tubs	39.75	43.75

Orders must be for immediate release.

Prices are subject to withdrawal without notice.

FEDERAL TRADE COMMISSION
Docket No. 6676 Respondent Exhibit No. 20
In the Matter of Universal Rundle
Date 11/1/62 Witness Reporter

Special Remarks:

SIGNED BY: W. F. Farrell
Sales Manager (or Designee)

Vice President, Sales (or Designee) 2258

VRX 21

SPECIAL PRICE OR DISCOUNT APPROVAL
Form No. 1211 - 7/57

For: ALL DISTRICTS

Special Price Approval No.	ALL-2-57
Effective Date	7-15-57
Expiration Date	WHEN WITHDRAWN

DATE	SUPERCEDES APPROVAL		APPLIES TO			
	Number	Effective Date	District Sales Mgr.	Territory	Customer Code No.	U/R Order No.
7-15-57	-	-	-	-	-	-

Reason for Special Price or Discount: All major competitors have issued similar prices. Meeting competitors.

Type of Special Price or Discount: On April 10, 1957, all districts were authorized to offer the following items at the prices indicated:

	White	Color
4030 Cardinal Closet	21.45	26.85
4035 Castle Closet	21.45	26.85
4554 Carman Lavatory	10.50	13.10

Subject to following conditions:

1.) May be withdrawn without notice

2.) Immediate release on orders

3.) In truckload orders or bigger

Special Remarks:

FEDERAL TRADE COMMISSION
DOCKET NO. 6026 RESPONDENT Exhibit No. 21
In the Matter of: Universal-Rundle
Date 11-1-62 Witness _____ Reporter _____

SIGNED BY: J.W. Fennell
Sales Manager (or Designee)

Vice President, Sales (or Designee)

VRX 22

Cancellation of
SPECIAL PRICE OR DISCOUNT APPROVAL
Form No. 1.111 - 7/57

For: ALL DISTRICTS

Special Price Approval No.
All -4-57
Effective Date
7-12-57
Expiration Date

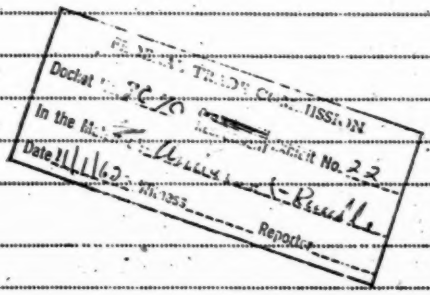
DATE	SUPERCEDES APPROVAL		APPLIES TO			
	Number	Effective Date	District Sales Mgr.	Territory	Customer Code No.	U/R Order No.
7-12-57	All-2-57	7-15-57				

Reason for Special Price or Discount: Withdrawal

Type of Special Price or Discount: Effective 7-12-57 the special prices on the Cardinal and Castle Closets and the Carman lavatory are withdrawn. No coverage is allowed beyond our regular terms outlined on the inside back cover of the Price Book.

Normal discounts will apply on new orders.

Confirming 'phone calls of 7-12-57.



Special Remarks:

SIGNED BY:

*Sales Manager (or Designee)

Vice President, Sales (or Designee)

22-10

FEDERAL TRADE COMMISSION
Docket No. 8070 ✓Respondent Exhibit No. 23
In the Matter of: Universal-Rundle
Date 11/1/62 Witness _____ Reporter _____

SPECIAL PRICE OR DISCOUNT APPROVAL
Form No. 1.111 - 7/37

For: ALL DISTRICTS

Special Price Approval No. ALL-3-57
Effective Date 7-15-57
Expiration Date WHEN WITHDRAWN

DATE	SUPERCEDES APPROVAL		APPLIES TO			
	Number	Effective Date	District Sales Mgr.	Territory	Customer Code No.	U/R Order No.
7-15-57	-	-	-	-	-	-

Reason for Special Price or Discount: To conform to pricing practices in steel sink industry.

Type of Special Price or Discount: Authorized to quote following prices in quantities indicated. Prices are delivered prices.

Part No.	Description	Quantities Ordered 1-10	11-50	Over 50
6523-24	Court 24 x 21	8.93	7.50	6.50
6533-34	Concourse 32 x 21	17.25	13.50	12.40

		1-49	Over 50
6543-44	Centennial-S&T RH Sink	21.98	20.50
6545-46	Centennial-S&T LH Sink	21.98	20.50
85205	Drainboard for Sink & Tray	2.95	2.95

		Any Quantity
65031	Fleetwing 32 x 20	14.65

		25	Over 25
6634	Commander 32 x 21	29.50	29.15
6624	Cavalier 24 x 21	17.40	17.00

SIGNED BY:

s/s F. W. Fennell
Sales Manager (or designee)

Vice President, Sales (or designee)

✓RX 24
B, PH., ATL, CH, SL

SPECIAL PRICE OR DISCOUNT APPROVAL
Form No. 1.111 - 7/57

For: BOSTON, PHILADELPHIA, ATLANTA, CHICAGO, ST. LOUIS DISTRICTS

Special Price Approval No.	L-1-57
Effective Date	7-15-57
Expiration Date	WHEN WITHDRAWN

DATE	SUPERCEDES APPROVAL		APPLIES TO			
	Number	Effective Date	District Sales Mgr.	Territory	Customer Code No.	U/R Order No.
7-15-57	-	-	-	-	-	-

Reason for Special Price or Discount: To meet monoline competition and regain low priced fixture business.

Type of Special Price or Discount: Authorization to offer the Civilian Closet at following price in white and in orders comprising a full truckload of ware or more:

4070 Civilian W/D White Only $18.50

Furnished with regular b/c, less bolt caps and floor screws, less trademark.

Subject to withdrawal without notice.

FEDERAL TRADE COMMISSION
Docket No. 8070 Exhibit No. 24
In the Matter of: Universal-Rundle
Date 11/16/62 Witness Reporter

Special Remarks:

SIGNED BY:

W. F. Turner
Sales Manager (or Designee)

2282

Vice President, Sales (or Designee)

VRX25-1

SPECIAL PRICE OR DISCOUNT APPROVAL

Form No. 1.281 - 2/57

FEDERAL TRADE COMMISSION

Docket No. 8070 Complaint No. 25

In the Matter of Universal-Rundle

Date 11/1/62 Witness Reporter

Special Price Approval No. ALL-6-57

Effective Date 8-9-57

Expiration Date WHEN WITHDRAWN

Port: ALL DISTRICTS

DATE	SUPERCEDES APPROVAL		APPLIES TO			
	Number	Effective Date	District Sales Mgr.	Territory	Customer Code No.	U/M Order No.
8-9-57	ALL-5-57	7-15-57	-	-	-	-

Reason for Special Price or Discount: To meet special cast iron prices of major competitors.

Type of Special Price or Discount: Authorized to offer the following prices:

Product No.	Item	White Regular	White A/R	Color
2110-11	Master Meadow	51.13	57.52	65.75
2114-15	Meade 14" Tub	41.94	43.97	46.27
2204	Ledgemaster 19 x 17	20.33	22.09	23.80
2203	Ledgemaster 22 x 19	22.67	24.78	26.84
2270	Wycliff 20 x 17	9.35	10.52	11.69
2212-13	Wayne 19 x 17	12.34	13.87	15.43
2210-11	Wakely 19 x 17	10.85	12.20	-
2352	Layton Ledge 32 x 21	-	18.76	20.83
2360	Layton Ledge 42 x 21	-	30.12	33.48
2310	Park Ledge 24 x 21	-	12.81	14.23

ORDERS MUST BE FOR IMMEDIATE RELEASE.

Special Remarks: PRICES SUBJECT TO WITHDRAWAL WITHOUT NOTICE.

MUST BE TRUCKLOAD OR CARLOAD QUANTITIES.

TO BE SHIPPED AT CONVENIENCE OF PLANT.

"Confirming Phone Calls of 8/9/57"

SIGNED BY:

[signature]

Vice President, Sales (or Designee)

2263

565

VRX 2-6

SPECIAL PRICE OR DISCOUNT APPROVAL

BOSTON, PHILADELPHIA, ATLANTA, DALLAS, ST. LOUIS, CHICAGO

Special Price Approval No. L-3-57
Effective Date 8-22-57
Expiration Date WHEN WITHDRAWN

DATE	SUPERCEDES APPROVAL		APPLIES TO			
	Number	Effective Date	District Sales Mgr.	Territory	Customer Code No.	O/A Order No.
8-22-57	-	-	-	-	-	-

Reason for Special Price or Discount: To meet competitors' prices.

Type of Special Price or Discount: Authorized to offer following prices on the items indicated:

		White	Color
1554	CARMEN LAVATORY	10.56	13.20
1030	CARDINAL COMBINATION	21.00	26.25
1035	CASTLE COMBINATION	21.00	26.25
1039	CASTLE COMBINATION	21.00	26.25
1072	CIVILIAN COMBINATION	18.50	
1070	COMMANDO		23.13
1122	CHAMPION BOWL	8.14	
1114	CHAMPION BOWL	8.14	

FEDERAL TRADE COMMISSION
Docket No. 5828 — 26
Washington (8 Exhibits)
Filed

Special Remarks: Orders must be for truckload quantities and for immediate release. Shipment at the convenience of our plants. Subject to withdrawal without notice.

Signed By:

Sales Manager (or Designee)

Vice President, Sales (or Designee)

2284

VRX-258

CONFIDENTIAL

July 15, 1957

DPE-1-57

(Supersedes DP-14-56)

SUBJECT: DISCOUNT POLICY for all Districts except the Western District

Note: "Wholesalers' Net Prices" mentioned apply to those published in the current Wholesale Price Book.

Vitreous China

Wholesalers' Net Prices will apply to Vitreous China fixtures when included in orders of LTL and LCL quantities.

Wholesalers' Net Prices will apply to drinking fountains.

Wholesalers' Net Prices will apply to #4010-#4011 combinations.

Wholesalers' Net Prices less 5% will apply to all other Vitreous China fixtures in white and color when included in orders of truckload or carload quantities with the following exceptions:

Wholesalers' Net Prices less 10% will apply to the following V/C fixtures in white when included in orders of truckload or carload quantities:

Washdown Uni-Closet Combinations	
Reverse Trap Uni-Closet Combinations	
#4544-4545	20 x 18 Lavatories
#4582-4583	19 x 15 Lavatories
#4554	20 x 18 Lavatories
#4558	20 x 18 Lavatories

Cast Iron

Wholesalers' Net Prices will apply to Cast Iron fixtures when included in orders of LTL and LCL quantities.

Wholesalers' Net Prices will apply to Cast Iron fixtures in white and color when included in orders of truckload or carload quantities with the following exceptions:

FEDERAL TRADE COMMISSION
Docket No. 6070 Exhibit No. 75-A
In the Matter of: [illegible]
Date 11/12/57 Witness _____ Reporter _____

2266

RX 286

July 15, 1957
DPE-1-57

Wholesalers' Net Prices less 5% will apply to the following Cast Iron fixtures in white when included in orders of TL and CL quantities:

#2110-2111	5' Recess Tubs
#2204	19 x 17 Lavatories
#2210-2211	19 x 17 Lavatories
#2212-2213	19 x 17 Lavatories
#2352	32 x 21 Sink

Steel Fixtures

Wholesalers' Net Prices will apply to steel tubs with the following exception:

Wholesalers' Net Prices less 5% will apply to steel tubs in white and color when ordered in carload quantities.

Wholesalers' Net Prices will apply to all other steel fixtures.

Fittings

Wholesalers' Net Prices will apply to fittings.

Wholesalers' Net Prices will apply to Trap Standards, Seats, etc.

F. W. FENNELL

C. N. Whittaker	J. W. Sant	E. S. Harber
Stanley S. Backner	A. O. Knecht	D. F. McCarthy
L. St. Moritz	W. S. Porter	F. A. Glenn
W. C. Dickey	F. H. Cornelius	F. A. Rippchen
H. P. Wangelin	B. F. Thompson	G. F. Steck
A. H. Shepherd	E. T. Sabin	Sales Representatives
J. M. Patterson	D. W. Erie	A. M. Mackenzie

FEDERAL TRADE COMMISSION
Docket No. 5620 RESPONDENT Exhibit No. 2813

2293

238-135 O - 66 - 6

FEDERAL TRADE COMMISSION
Docket No. 8670 RESPONDENT Exhibit No. 31A
In the Matter of Case Manufacturing Co.
Date 6-11-62 Witness Reporter
Case MANUFACTURING
FEDERAL TRADE COMMISSION
Docket No. 31 A
RX 31A

GENERAL SALES DEPARTMENT

ROBINSON, ILLINOIS January 31, 1961

TO OUR CUSTOMERS:

BOOSTER LINE PRICES

Effective immediately the following wholesalers' net prices will prevail on the popular Booster Line:

SPECIAL PACKAGE DEAL IN TRUCKLOAD LOTS

	White	Color
Package A - #1390 Washdown and 19" x 17" Winchester	$ 22.00	$ 27.25
Package B - #1340 Reverse Trap and 19" x 17" Winchester	22.50	30.15
Package C - #1390 Washdown and 20" x 18" Winchester	23.85	28.95
Package D - #1340 Reverse Trap and 20" x 18" Winchester	24.35	31.85

		Shipping Wt.	LTL up to 2500#		LTL 2500# to 7500#		7500# Pool T/L or 22,000# T/L	
			White	Color	White	Color	White	Color
#1390	Case Ace Washdown Closet with bolt caps and screws, less seat & supply	87	$18.89	24.00	16.15	21.60	15.75	20.20
#1340	Case Ultra Reverse Trap Closet with bolt caps and screws, less seat & supply	86	$21.00	26.25	18.00	23.62	16.50	22.55
#923	19" x 17" Winchester Lav. with #197 Hanger	37	$ 8.29	10.60	7.12	9.54	6.95	8.90
#923	20" x 18" Winchester Lav. with #197 Hanger	38	10.79	13.70	9.25	12.33	8.80	10.60

If anti-syphon ballcock is required add $ .65

ruckload Rate of Freight Allowed up to $2.25 on all shipments over 200#. Pool Truckload of 7500# delivered with only stop-over charge. Full Truckloads of 22,000# Prepaid for Free Delivery.

2% Cash discount, 15th Prox. Other Trade Terms per our Wholesalers' Net Price Sheet.

CASE MANUFACTURING,
Div. of Ogden Corp.

2288

Bulletin R-147

In the
United States Court of Appeals
For the Seventh Circuit

RECEIVED
APR 15 1966
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 14763 SEPTEMBER TERM, 1965 SEPTEMBER SESSION, 1965

UNIVERSAL-RUNDLE CORPORATION, *Petitioner,*
v.
FEDERAL TRADE COMMISSION, *Respondent.*

On Petition to Review an Order of the Federal Trade Commission.

Opinion — OCTOBER 22, 1965.

Before DUFFY, SCHNACKENBERG and KNOCH, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Universal-Rundle Corporation, a Delaware corporation, by its petition asks us to review and set aside an order of the Federal Trade Commission issued on June 12, 1964 and its order issued on August 4, 1964.[1]

Petitioner is a nationwide manufacturer, distributor and seller of plumbing supplies and equipment, including a complete line of "U-R" brand vitreous china and enameled cast-iron plumbing fixtures. In the sale of its products, petitioner has a wholesaler's net price and also a truckload price which is below the wholesaler's net list price. The truckload price is applicable only to the purchases of a truckload or more of fixtures, and the Commission found that the differentials involved are those averaging 10% between truckload prices and the wholesaler's list prices. A truckload order may consist of, any

[1] At the conclusion of hearings, the examiner made an initial decision which was modified by the Commission's final order.

combination of fixtures and the discount rate on such truckload purchases varies from order to order, depending on the list and truckload prices of the individual fixtures at time of purchase. As to petitioner, the situation in Philadelphia, Pennsylvania, was that Mars Supply Company, a large dealer, was the only one which bought in truckloads. In 1957 its four truckload orders amounted to $23,251.23. At petitioner's wholesaler's net price Mars would have paid $25,795.53, indicating a preferential allowance or discount of about 9.9%. On the basis of such testimony the Commission found that Mars competed with nonfavored customers in Philadelphia through its main store and with nonfavored customers in Camden, New Jersey through its branch store, and also that Mars competed with nonfavored dealers in selling directly to the consumer.

The Commission found price discriminations were sufficient "to give the recipients of the lower prices a substantial advantage over their non-favored competitors" and that such discriminations may be substantially to affect customer competition adversely. In its opinion, and by adopting the examiner's decision as modified, the Commission found that competition in the resale of petitioner's "U-R" brand of plumbing fixtures was keen in the Philadelphia-Camden area; that price was a very important competitive factor in the plumbing-fixture business; that the differentials if reflected in the resale price of the products would have been sufficient to divert business from nonfavored customers to Mars; that the margin of profit in the resale of plumbing fixtures appears to be small; and that a 2% cash discount was essential to a profitable operation. The Commission concluded that under the circumstances "competitive injury may be anticipated if [petitioner's] pricing practices with regard to the sale of its U-R line of products are allowed to continue," and that petitioner's discriminations violated Section 2 (a) of the Clayton Act, as amended.

In this court the conflict between the legal theories of the parties may now be stated in abbreviated form.

Petitioner argues that the evidence showed a lack of competition at the retail level, which precludes a finding of a violation, and also that competition is not adversely

affected as a result of price discrimination in a situation wherein all buyers are free to avail themselves of the lower prices if they desire to do so. It relies on the fact that the discounts in question were available to any purchaser buying in truckload quantities.

Petitioner further contends the failure of the "favored" buyer to avail itself of the discounts found to be discriminatory on a substantial portion of its purchase is not irrelevant, as it demonstrates the lack of competitive significance of the discounts themselves.

The argument is further advanced by petitioner that the finding of intense price competition at the "dealer" level leading to probable diversion is unsupported by, and contrary to, the evidence, and it is error to infer the probable competitive impact of a truckload discount by comparing it to a cash discount, because such discounts are entirely dissimilar in an economic sense, and that the amount of discrimination between competing purchasers is too insubstantial to support the finding of violation.

The Commission's final order of June 12, 1964 rejected the examiner's finding that petitioner's sales to its Camden, New Jersey customers were in interstate commerce, but in other respects agreed with the examiner and denied the appeal from his order. It modified the initial decision accordingly and then adopted it on June 12, 1964.

This action was promptly followed by petitioner's filing with the Commission on July 20, 1964 its petition requesting that further action be stayed to permit the Commission sufficient time to investigate and institute whatever proceedings are deemed appropriate by the Commission to correct an *industry-wide* practice by plumbing fixture manufacturers of granting discounts in prices on truckload shipments.

Petitioner there stated:

> "* * * Such a stay, when followed by appropriate action by the Commission to place all manufacturers in this industry on the same competitive basis, would avoid the obvious competitive disadvantage and extreme hardship under which respondent [petitioner here] would otherwise have to compete and minimize

the probability of any substantial decline in respondent's sales volume which would be a consequence of the Commission's order."

Accompanying the petition were written statements of facts and exhibits indicating that each of the following named competitors of petitioner operates its business on a discount and truckload purchase plan as does petitioner, with however an important exception as to the approximate amount of the average truckload discount allowed by each of said competitors, which the following list shows:

	Average discount Allowed
American Standard[2]	18.0%
Eljer Division of The Murray Corporation of America	18.0%
Rheem Manufacturing Co.	17.5%
Briggs Manufacturing Company	13.0%
Kohler Co.	18.0%
Crane Co.	18.0%

Petitioner called the Commission's attention to the fact that this evidence shows that its competitors use price differentials *far in excess* of the average truckload discount granted by petitioner, as disclosed by the record in this proceeding.

The sworn petition for withdrawal of the order of the Commission also shows that the respective shares of the market enjoyed by the seven principal manufacturers of plumbing fixtures in the United States are, as follows:

1. American Radiator & Standard Sanitary Corporation	32.0%
2. Kohler Co.	15.0%
3. Eljer Division of The Murray Corporation of America	10.0%
4. Crane Co.	9.0%
5. Briggs Manufacturing Company	6.0%
6. Universal-Rundle Corporation	5.75%
7. Rheem Manufacturing Co.	5.0%

[2] It appears to be a division of American Radiator & Standard Sanitary Corporation.

However, the petition of July 20, 1964 was denied on August 4, 1964.

It is apparent that the Commission has directed its attack against a general practice which is prevalent in the industry. However, it has not aimed at the entire industry or at any of the largest manufacturers in the group. It has selected one whose share of the market is less than 6%, although the practice complained of is common to the industry. The obvious injustice of this method of reaching an industry-wide problem lies, not only in the selection of one of the smallest participants marketwise as a target, but also in the fact that the target selected is charged with allowing an average truckload discount of 10% when its competitors are granting average truckload discounts running between 13% and 18%.

This inequitable approach to the solution of an antitrust problem, submitted to us because of the action of the Federal Trade Commission in centering this proceeding solely on petitioner, was unjustified. Its contrary determination was a patent abuse of discretion and must be overturned. *Moog Industries* v. *Federal Trade Commission,* 355 U. S. 411, 414. We cannot, in the name of an antitrust prosecution, lend our support to the sacrifice of a comparatively small manufacturer, when its larger and more guilty competitors are not prosecuted.

We are not convinced that the Clayton Act requires us to approve the imposition of sanctions upon only one of the smallest of a group of law violators. If we did, the giants in the field would be the real benefactors—not the public.

No reason is apparent why the Commission did not bring in these larger competitors and seek a final decree covering all of them. They are not numerous. The industry is, according to the record, limited to a few. This case is thus distinguishable from *E. Edelmann & Co.* v. *Federal Trade Commission,* 7 Cir., 239 F.2d 152 (1956); cert. denied 355 U.S. 941 (1958). Moreover, in that case it appears, at 156, that the discount system employed by petitioner Edelmann was not the same as that of its two principal competitors and Edelmann did not establish that its lower price was made in good faith to meet a competitor's equally low price.

The Commission now relies on *C. E. Niehoff & Co.* v. *Federal Trade Commission*, 241 F. 2d 37 (1957) where we stayed the effective date of a Commission order, under the circumstances of that case, and its subsequent reversal, *sub nom, Moog Industries* v. *Federal Trade Commission, supra.* While we had affirmed the Commission's determination of statutory violation, we directed that the cease and desist order should take effect "at such time in the future" as we might direct and hence our order was reversed, as aforesaid. The Supreme Court, at 414, recognized that, if the Commission had patently abused its discretion in determining that its order should not be held in abeyance until respondent's competitors were proceeded against, a court of appeals might overturn the Commission's determination. That is the situation now before us.

Counsel for the Commission admit in their brief in this court "petitioner submitted specific information to the Commission tending to show current violation of Section 2 (a) by two of its competitors" and that it also was "conducting another investigation of one of the companies, which, *although not involving* Section 2 (a) of the *Clayton Act,* might indicate whether that section was being violated." (Italics added.) This brought about the investigation by the antitrust division of the Department of Justice of those two competitors.

In the case at bar, it appears that, by letter dated *April 19, 1965,* Commission counsel wrote to petitioner's counsel herein that the reason the Commission would not *then* undertake any industry-wide investigation of petitioner's competitors was that such an investigation "would conflict with an investigation *now* being conducted by the Antitrust Division of the Department of Justice". We are not impressed by this reference to a belated investigation conducted in *1965* which was many months after the proceeding before the Commission occurred and the entry of the orders of the Commission which we are now reviewing. Even if not tardy, such an investigation by the Department of Justice does not qualify as an investigation by the Commission, which, in our opinion, was the agency which was called upon to act in all matters pertaining to the case at bar. We hold that the duty of

the Commission to bring into the case before it petitioner's powerful competitors could not be excused or condoned by the Commission asserting, after it had by its order condemned petitioner, that a branch of the executive department of the government had commenced an investigation.

An investigation of an industry is germane to a proceeding before the Commission, and it has a duty to so investigate in a proper case. We have already indicated our view that petitioner's showing was sufficient to require the Commission to make petitioner's competitors parties thereto. The Commission was the proper forum to receive and act upon the result of such an investigation. Recently, in an address before the Bar Association of the District of Columbia, Commissioner Jones (of the present Commission) stated February 25, 1965:

> "Industry-wide enforcement of the law is almost a constitutional imperative as a matter both of fairness and equality before the law. It is clear that we have no right to and could not permit some law violators to go free while prosecuting others. • • •"

For the reasons herein set forth, the order of the Commission entered August 4, 1964 is set aside and this cause is remanded for further proceedings as prayed in the petition of Universal-Rundle Corporation filed July 20, 1964. We reserve our ruling on the petition to set aside the final order of June 12, 1964.

ORDER OF AUGUST 4, 1964 SET ASIDE AND CAUSE REMANDED, WITH INSTRUCTIONS. RULING RESERVED AS TO ORDER OF JUNE 12, 1964.

Opinion by Judge Schnackenberg

In the United States Court of Appeals

For the Seventh Circuit

~~Chicago, Illinois 60604~~

~~Friday~~, October 22, 19 65

Before

Hon. F. RYAN DUFFY, Circuit Judge

Hon. ELMER J. SCHNACKENBERG, Circuit Judge

Hon. WIN G. KNOCH, Circuit Judge

UNIVERSAL-RUNDLE CORPORATION, Petitioner,		Petiton for review of an order of the Federal Trade Commission.
No. 14763	vs.	
FEDERAL TRADE COMMISSION, Respondent.		

Order remanding case to Federal Trade Commission

This cause came on to be heard on the petition for review of orders of the Federal Trade Commission and the record from the Federal Trade Commission, and was argued by counsel.

On consideration whereof, it is ordered by this Court that the order of the Federal Trade Commission entered August 4, 1964, be, and the same is hereby set aside, and that this cause be, and the same is hereby REMANDED to the Federal Trade Commission for further proceedings as prayed in the petition of Universal-Rundle Corporation filed July 20, 1964, in accordance with the opinion of this Court filed this day.

This Court reserves ruling on the petition to set aside the final order of June 12, 1964.

United States Court of Appeals

For the Seventh Circuit

~~Chicago, Illinois 60604~~

FRIDAY, December 17, 1965

Before

Hon. JOHN S. HASTINGS, Chief Judge
Hon. F. RYAN DUFFY, Circuit Judge
Hon. ELMER J. SCHNACKENBERG, Circuit Judge
Hon. WIN C. KNOCH, Circuit Judge
Hon. LATHAM CASTLE, Circuit Judge
Hon. ROGER J. KILEY, Circuit Judge
Hon. LUTHER M. SWYGERT, Circuit Judge

UNIVERSAL-RUNDLE CORPORATION,
Petitioner,

No. ~~14763~~

vs.

~~FEDERAL TRADE COMMISSION,~~
Respondent.

Petition for review of an order of the Federal Trade Commission.

IT IS ORDERED by the Court that the petition of the Federal Trade Commission for a rehearing en banc be, and the same is hereby DENIED.

(SWYGERT, C.J. voted to grant the petition for rehearing en banc).

Supreme Court of the United States

No. ---------- , *October Term, 19* 65

FEDERAL TRADE COMMISSION,

Petitioner,

vs

UNIVERSAL-RUNDLE CORPORATION

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI — March 17, 1966

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 16th, 19 66

Tom C. Clark

Associate Justice of the Supreme Court of the United States

Dated this 17th day of March, 1966

Supreme Court of the United States

No. 101 ---, October Term, 19 65

Federal Trade Commission,

Petitioner,

v.

Universal-Rundle Corporation

ORDER ALLOWING CERTIORARI. ~~Filed~~ October 10 ------, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh ---------- Circuit is granted, and case placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE : 1966 O - 238-135

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CITATIONS

Cases:	
Federal Trade Commission v. *C. E. Niehoff & Co.*, 355 U.S. 411, reversing 241 F. 2d 37	8, 9
Federal Trade Commission v. *Keppel & Bro., Inc.*, 291 U.S. 304	9
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Statutes:	
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Section 2, 15 U.S.C. 13	2, 3, 5, 1a
Section 11, 15 U.S.C. 21	2, 2a
Miscellaneous:	
United States Department of Commerce, Bureau of the Census, *Current Industrial Reports, Plumbing Fixtures*, Second Quarter 1965, September 9, 1965	7

213-112—66——1

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. ——

FEDERAL TRADE COMMISSION, PETITIONER

v.

UNIVERSAL-RUNDLE CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the Federal Trade Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (Appendix B, *infra,* pp. 4a–12a) is reported at 352 F. 2d 831.

JURISDICTION

The judgment of the court of appeals was entered on October 22, 1965 (Appendix B, *infra,* p. 13a). A timely petition for rehearing and for rehearing *en banc* was denied on December 17, 1965 (Appendix B, *infra,* p. 15a). On March 17, 1966, Mr. Justice Clark extended the time for filing a petition for a writ of certiorari to and including April 16, 1966.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals exceeded its authority as a reviewing court by postponing the operation of a Federal Trade Commission cease-and-desist order without passing on its validity, for the stated purpose of requiring the Commission to investigate the trade practices in question on an industry-wide basis.

STATUTES INVOLVED

The pertinent provisions of Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13, and Section 11 of the Clayton Act, as amended by the Act of December 29, 1950, 64 Stat. 1127, and by the Finality Act of 1959, 73 Stat. 243, 15 U.S.C. 21, are set out in Appendix A, *infra,* pp. 1a–3a.

STATEMENT

Respondent, the manufacturer of "U–R" brand plumbing fixtures, which it sells and distributes throughout the United States (R. 15–17),[1] maintains two prices on all these fixtures: a wholesale net price and a truckload price which, on individual items, is from 5 percent to 15 percent lower (R. 17–20).[2] In a complaint issued on August 4, 1960 (R. 1–3), the Fed-

[1] "R." refers to the "Appendix to Brief for Petitioners" filed by Universal-Rundle in the court below.

[2] Because a truckload purchase may consist of any combination of fixtures, the resulting discounts for each purchase vary from order to order (R. 16, 38–40, 145–146, 187). On the average, the discounts equal about 10 percent (R. 43).

eral Trade Commission charged that these truckload discounts violated Section 2(a) of the Clayton Act, as amended, 15 U.S.C. 13(a) (Appendix A, *infra*, p. 1a). After an evidentiary hearing (R. 76–491) and cross-appeals from the Hearing Examiner's initial decision (R. 12–28), the Commission on June 12, 1964, found that the effect of the price discrimination resulting from respondent's truckload discounts may be substantially to lessen competition among respondent's customers (R. 44) [3] and issued a cease-and-desist order (R. 29).

On July 20, 1964, respondent petitioned the Commission to stay its order (R. 46–53), alleging for the first time that the granting of truckload discounts was an industry-wide practice.[4] The petition further alleged that, unless a stay were granted, respondent would operate under a "competitive disadvantage and extreme hardship" and probably would suffer "a substantial decline in * * * sales volume" (R. 47). Appended to this petition were (1) an affidavit of respondent's vice-president stating his belief that certain of respondent's competitors were also granting truckload discounts (R. 54–56), (2) the price lists of respondent's six leading competitors and summaries pre-

[3] Respondent also manufactures "Homart" brand plumbing fixtures, which it sells exclusively to Sears, Roebuck & Co. A charge that respondent was illegally discriminating in favor of Sears was dismissed by the Commission (R. 28–29) and is not involved here.

[4] In its answer to the complaint, respondent alleged that any lower prices it gave to favored customers "were given in good faith to meet competition" (R. 7), but it did not develop this defense during the proceedings.

pared therefrom, and (3) Dun and Bradstreet reports on these firms.[5]

On August 4, 1964, the Commission denied respondent's petition. It explained that, contrary to respondent's assumption that the Commission had found truckload discounts unlawful *per se*, the legality of discount practices depends upon the determination in each case "whether the discount creates a price difference, whether the recipient of such a discount is competing at the same functional level with a customer paying a higher price, whether the customer buying in less than truckload quantities is able to avail itself of the truckload discount, and whether the differential is sufficient in the competitive conditions shown to exist to have the requisite anticompetitive effects" (R. 63). It also noted that account must be taken in each case of statutory justifications given by the seller. Viewing respondent's assertions in the light of these considerations, the Commission concluded that "the general allegation by respondent that its competitors are granting truckload discounts is not a sufficient basis for instituting industry-wide proceedings to condemn this practice nor is it a valid reason for withholding enforcement of the order entered against respondent in this matter" (R. 63).

Respondent petitioned the court of appeals for review of both the Commission's cease-and-desist order and its order denying the stay. The court, without deciding the merits, set aside the denial of the stay.

[5] We are lodging respondent's petition and its appended exhibits (the latter were not printed in the appendix filed in the court below) with the Clerk of this Court.

Relying on the allegations in respondent's petition for a stay and its accompanying affidavit, the court found that the Commission had adopted an "inequitable approach" to "an industry-wide problem" by proceeding against "a comparatively small manufacturer, when its larger and more guilty competitors are not prosecuted" (Appendix B, *infra*, p. 9a). The court ruled that the Commission had a "duty * * * to bring into the case before it [respondent's] powerful competitors" (Appendix B, *infra*, p. 11a) and that this duty was not satisfied or excused by the other investigations which were pending at the time the case reached the court of appeals.[6] Accordingly, the court held that the Commission's denial of a stay was a "patent" abuse of discretion within the meaning of *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411 (Appendix B, *infra*, pp. 9a, 10a), and remanded the case to the Commission for further proceedings (Appendix B, *infra*, pp. 11a–12a).

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals conflicts with and misapplies this Court's decision in *Moog Industries, supra*. In that case, this Court held that the question whether Commission orders "should be held in abeyance until the respondents' competitors are proceeded against is for the Commission to decide"

[6] The Commission had informed the court that it was conducting an investigation of one of respondent's major competitors, which, while instituted for other reasons, could well reveal violations of Section 2(a), and that the Antitrust Division of the Department of Justice was conducting an investigation with which an industry-wide investigation by the Commission would conflict.

(355 U.S. at 413–414). Recognizing that "in the shaping of its remedies within the framework of regulatory legislation, an agency is called upon to exercise its specialized, experienced judgment," the Court stated (*id.* at 413):

> * * * Thus, the decision as to whether or not an order against one firm to cease and desist from engaging in illegal price discrimination should go into effect before others are similarly prohibited depends on a variety of factors peculiarly within the expert understanding of the Commission. Only the Commission, for example, is competent to make an initial determination as to * * * whether or not the nature of * * * competition [in the relevant industry] is such as to indicate identical treatment of the entire industry by an enforcement agency. Moreover, *although an allegedly illegal practice may appear to be operative throughout an industry, whether such appearances reflect fact and whether all firms in the industry should be dealt with in a single proceeding or should receive individualized treatment are questions that call for discretionary determination by the administrative agency.* It is clearly within the special competence of the Commission to appraise the adverse effect on competition that might result from postponing a particular order prohibiting continued violations of the law. * * * [Emphasis supplied.]

Thus, the Court concluded, the Commission's discretionary determination not to stay the effectiveness of a particular order may "not be overturned in the absence of a *patent* abuse of discretion" (*id.* at 414; emphasis supplied).

The Commission's refusal in this case to stay the order against respondent plainly was not a "patent abuse of discretion." Although respondent contended before the Commission that the entire industry was granting similar unlawful truckload discounts, it offered no evidence that competitors actually discriminated in price between competing customers.[7] Nevertheless, the Commission carefully considered respondent's petition. Explaining that truckload discounts were not unlawful *per se* and pointing out that respondent had not shown that its competitors' pricing practices caused competitive injury, the Commission reasonably concluded that respondent's contentions were insufficient to require it to postpone the order until it

[7] The court of appeals' premise—that unlawful price discrimination was an industry-wide practice of which respondent's larger competitors were "more guilty" than it (see Statement, *supra*, p. 5)—is not supported by respondent's petition for a stay. Not only does the petition fail to establish the illegality of competitors' prices, but the exhibits attached thereto reveal that, while respondent grants truckload discounts on its full line of fixtures in any combination (see Appendix B, *infra*, pp. 4a–5a), every other manufacturer referred to grants truckload prices on only a few specified items. Nor does the record support the court's statement that respondent is a "comparatively small manufacturer" in an industry "limited to a few" (Appendix B, *infra*, p. 9a). Respondent admitted that its market share figure of 5.75% (on the basis of which it ranked itself sixth in the industry) does not include its sales to Sears (R. 50 and n. 5). In addition to the six competitors whose price lists were attached to respondent's petition for a stay, at least eleven small plumbing fixture manufacturers are mentioned in the record (R. 435, 457), and, according to the Bureau of the Census, the industry is composed of at least 68 companies. United States Department of Commerce, Bureau of the Census, *Current Industrial Reports, Plumbing Fixtures*, Second Quarter 1965, September 9, 1965.

conducted an industry-wide proceeding (see Statement, *supra,* p. 4). Its decision not to institute such a proceeding was precisely the kind of "discretionary determination by the administrative agency" which this Court held in *Moog* was not subject to judicial reexamination (355 U.S. at 413). The Commission's decision in the present case was in accord with its settled practice of examining each application for a stay such as that filed by respondent in light of the circumstances of the particular case.[8]

Respondent in this case made a weaker claim before the Commission than that which this Court in *Federal Trade Commission* v. *C. E. Niehoff & Co.,* 355 U.S. 411, reversing 241 F. 2d 37 (C.A. 7), decided with *Moog,* found insufficient to justify the court of appeals in staying the agency's order. In *Niehoff,* the Court reversed the Seventh Circuit's stay of the Commission's order, holding that the Commission's denial of a stay was not a "patent abuse of discretion," despite Niehoff's claim that it "would have to go out of business" if the Commission's order became effective (355 U.S.

[8] The Commission's records show that since January 1, 1964, there have been at least eleven other cases, including five under the Robinson-Patman Act, in which the Commission has denied applications for stays such as respondent's. In some of these cases the Commission also had proceeded against a respondent's competitors; in others it had not done so. Synopses of these decisions are set forth in Appendix C, *infra,* pp. 17a–18a. In other cases, it should be noted, the Commission has granted relief from its orders or dismissed complaints on the basis of intervening decisions involving a respondent's competitors. *E.g.,* *Plough, Inc.,* FTC Docket No. 8563, April 30, 1964 (dismissing complaint); *Towel Shop,* FTC Docket No. 7533, June 4, 1964 (modifying cease and desist order).

at 412). In the present case, respondent alleged only that it probably would suffer a substantial decline in sales; under *Niehoff* that claim *a fortiori* did not require the Commission to postpone its order.

If allowed to stand, the decision below would create a serious loophole in the strict rule enunciated in *Moog*.[9] By making its own initial finding as to the competitive situation in the industry and its own initial determination that truckload discounts should be considered on an industry-wide basis, the court below departed from this Court's holding that "the Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically" (355 U.S. at 413). The exception permitting judicial review of Commission refusals to stay orders in cases of "patent" abuse of discretion is an extremely narrow one. If a "patent" abuse of discretion could be established by the mere claim that other members of the industry are engaged in the same practice and that failure to proceed also against them will subject the particular company against which the order is directed to economic injury, the way would be open for reviewing courts widely to substitute their judgment for the

[9] Even before *Moog*, parallel violations by competitors had never been viewed as a bar to the correction of illegal conduct. See *Federal Trade Commission* v. *Keppel & Bro., Inc.*, 291 U.S. 304, 308, 309, 312–313; *United States* v. *Wabash R.R. Co.*, 321 U.S. 403, 404; *National Candy Co.* v. *Federal Trade Commission*, 104 F. 2d 999, 1004 (C.A. 7).

Commission's on a matter peculiarly within the agency's expertise.[10]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
DONALD F. TURNER,
Assistant Attorney General.
JEROME I. CHAPMAN,
Assistant to the Solicitor General.
HOWARD E. SHAPIRO,
JOHN T. MARSHALL,
Attorneys.

JAMES MCI. HENDERSON,
General Counsel,
Federal Trade Commission.

APRIL 1966.

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[10] The error of the court below in misapplying *Moog* is compounded by its failure to determine the validity of the Commission's cease-and-desist order before deciding whether to stay it. Sound judicial administration requires that the reviewing court decide the validity of an order before considering when it should become effective. For if an order is found invalid, there is no occasion to decide whether it should be stayed. Moreover, the decision below would result in a serious and unnecessary waste of the Commission's resources if, after lengthy industry-wide proceedings, the court of appeals were to rule that the agency's substantive theory is erroneous. Thus, even if the reviewing court were justified in staying the Commission's order—which it was not—the court should not have considered that question until it had first determined the validity of that order.

APPENDIX A

Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13, provides in part:

> (a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or * * * and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *
>
> (b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order

terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

Section 11 of the Clayton Act, as amended by the Act of December 29, 1950, 64 Stat. 1127, and by the Finality Act of 1959, 73 Stat. 243, 15 U.S.C. 21, provides in part:

(b) Whenever the Commission * * * shall have reason to believe that any person is violating or has violated any of the provisions of sections 2, 3, 7, and 8 of this Act, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. * * * If upon such hearing the Commission * * * shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, * * *

(c) Any person required by such order of the commission or board to cease and desist from any such violation may obtain a review of such order in the court of appeals of the United States for any circuit within which such violation occurred or within which such person resides or carries on business, by filing in the court, within sixty days after the date of the service of such order, a written petition praying that the order of the commission or board be

set aside. * * * Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the commission or board until the filing of the record, and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the commission or board, and enforcing the same to the extent that such order is affirmed, and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the commission or board as to the facts, if supported by substantial evidence, shall be conclusive. * * *

* * * * *

(e) Such proceedings in the court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. * * *

* * * * *

(g) Any order issued under subsection (b) shall become final—

(1) upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the commission or board may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b); or

(2) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the commission or board has been affirmed, or the petition for review has been dismissed by the court of appeals, and no petition for certiorari has been duly filed; * * *

APPENDIX B

In the United States Court of Appeals for the Seventh Circuit

NO. 14763 SEPTEMBER TERM, 1965 SEPTEMBER SESSION, 1965

UNIVERSAL-RUNDLE CORPORATION, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

October 22, 1965

On Petition To Review an Order of the Federal Trade Commission

Before DUFFY, SCHNACKENBERG and KNOCH, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Universal-Rundle Corporation, a Delaware corporation, by its petition asks us to review and set aside an order of the Federal Trade Commission issued on June 12, 1964 and its order issued on August 4, 1964.[1]

Petitioner is a nationwide manufacturer, distributor and seller of plumbing supplies and equipment, including a complete line of "U-R" brand vitreous china and enameled cast-iron plumbing fixtures. In the sale of its products, petitioner has a wholesaler's net price and also a truckload price which is below the wholesaler's net list price. The truckload price is applicable only to the purchases of a truckload or

[1] At the conclusion of hearings, the examiner made an initial decision which was modified by the Commission's final order.

more of fixtures, and the Commission found that the differentials involved are those averaging 10% between truckload prices and the wholesaler's list prices. A truckload order may consist of any combination of fixtures and the discount rate on such truckload purchases varies from order to order, depending on the list and truckload prices of the individual fixtures at time of purchase. As to petitioner, the situation in Philadelphia, Pennsylvania, was that Mars Supply Company, a large dealer, was the only one which bought in truckloads. In 1957 its four truckload orders amounted to $23,251.23. At petitioner's wholesaler's net price Mars would have paid $25,795.53, indicating a preferential allowance or discount of about 9.9%. On the basis of such testimony the Commission found that Mars competed with nonfavored customers in Philadelphia through its main store and with nonfavored customers in Camden, New Jersey through its branch store, and also that Mars competed with nonfavored dealers in selling directly to the consumer.

The Commission found price discriminations were sufficient "to give the recipients of the lower prices a substantial advantage over their non-favored competitors" and that such discriminations may be substantially to affect customer competition adversely. In its opinion, and by adopting the examiner's decision as modified, the Commission found that competition in the resale of petitioner's "U–R" brand of plumbing fixtures was keen in the Philadelphia-Camden area; that price was a very important competitive factor in the plumbing-fixture business; that the differentials if reflected in the resale price of the products would have been sufficient to divert business from nonfavored customers to Mars; that the margin of

profit in the resale of plumbing fixtures appears to be small; and that a 2% cash discount was essential to a profitable operation. The Commission concluded that under the circumstances "competitive injury may be anticipated if [petitioner's] pricing practices with regard to the sale of its U–R line of products are allowed to continue," and that petitioner's discriminations violated Section 2(a) of the Clayton Act, as amended.

In this court the conflict between the legal theories of the parties may now be stated in abbreviated form.

Petitioner argues that the evidence showed a lack of competition at the retail level, which precludes a finding of a violation, and also that competition is not adversely affected as a result of price discrimination in a situation wherein all buyers are free to avail themselves of the lower prices if they desire to do so. It relies on the fact that the discounts in question were available to any purchaser buying in truckload quantities.

Petitioner further contends the failure of the "favored" buyer to avail itself of the discounts found to be discriminatory on a substantial portion of its purchase is not irrelevant, as it demonstrates the lack of competitive significance of the discounts themselves.

The argument is further advanced by petitioner that the finding of intense price competition at the "dealer" level leading to probable diversion is unsupported by, and contrary to, the evidence, and it is error to infer the probable competitive impact of a truckload discount by comparing it to a cash discount, because such discounts are entirely dissimilar in an economic sense, and that the amount of discrimination between competing purchasers is too insubstantial to support the finding of violation.

The Commission's final order of June 12, 1964 rejected the examiner's finding that petitioner's sales to its Camden, New Jersey customers were in interstate commerce, but in other respects agreed with the examiner and denied the appeal from his order. It modified the initial decision accordingly and then adopted it on June 12, 1964.

This action was promptly followed by petitioner's filing with the Commission on July 20, 1964 its petition requesting that further action be stayed to permit the Commission sufficient time to investigate and institute whatever proceedings are deemed appropriate by the Commission to correct an *industry-wide* practice by plumbing fixture manufacturers of granting discounts in prices on truckload shipments.

Petitioner there stated:

> * * * Such a stay, when followed by appropriate action by the Commission to place all manufacturers in this industry on the same competitive basis, would avoid the obvious competitive disadvantage and extreme hardship under which respondent [petitioner here] would otherwise have to compete and minimize the probability of any substantial decline in respondent's sales volume which would be a consequence of the Commission's order.

Accompanying the petition were written statements of facts and exhibits indicating that each of the following named competitors of petitioner operates its business on a discount and truckload purchase plan as does petitioner, with however an important exception as to the approximate amount of the aver-

age truckload discount allowed by each of said competitors, which the following list shows:

	Average discount allowed
American Standard[2]	18.0%
Eljer Division of The Murray Corporation of America	18.0%
Rheem Manufacturing Co.	17.5%
Briggs Manufacturing Company	13.0%
Kohler Co.	18.0%
Crane Co.	18.0%

Petitioner called the Commission's attention to the fact that this evidence shows that its competitors use price differentials *far in excess* of the average truckload discount granted by petitioner, as disclosed by the record in this proceeding.

The sworn petition for withdrawal of the order of the Commission also shows that the respective shares of the market enjoyed by the seven principal manufacturers of plumbing fixtures in the United States are, as follows:

1. American Radiator & Standard Sanitary Corporation	32.0%
2. Kohler Co.	15.0%
3. Eljer Division of The Murray Corporation of America	10.0%
4. Crane Co.	9.0%
5. Briggs Manufacturing Company	6.0%
6. Universal-Rundle Corporation	5.75%
7. Rheem Manufacturing Co.	5.0%

However, the petition of July 20, 1964 was denied on August 4, 1964.

It is apparent that the Commission has directed its attack against a general practice which is prevalent in the industry. However, it has not aimed at the entire industry or at any of the largest manufacturers in the group. It has selected one whose share of the market is less than 6%, although the practice complained of is common to the industry. The obvious

[2] It appears to be a division of American Radiator & Standard Sanitary Corporation.

injustice of this method of reaching an industry-wide problem lies, not only in the selection of one of the smallest participants marketwise as a target, but also in the fact that the target selected is charged with allowing an average truckload discount of 10% when its competitors are granting average truckload discounts running between 13% and 18%.

This inequitable approach to the solution of an antitrust problem, submitted to us because of the action of the Federal Trade Commission in centering this proceeding solely on petitioner, was unjustified. Its contrary determination was a patent abuse of discretion and must be overturned. *Moog Industries* v. *Federal Trade Commission,* 355 U.S. 411, 414. We cannot, in the name of an antitrust prosecution, lend our support to the sacrifice of a comparatively small manufacturer, when its larger and more guilty competitors are not prosecuted.

We are not convinced that the Clayton Act requires us to approve the imposition of sanctions upon only one of the smallest of a group of law violators. If we did, the giants in the field would be the real benefactors—not the public.

No reason is apparent why the Commission did not bring in these larger competitors and seek a final decree covering all of them. They are not numerous. The industry is, according to the record, limited to a few. This case is thus distinguishable from *E. Edelmann & Co.* v. *Federal Trade Commission,* 7 Cir., 239 F. 2d 152 (1956); cert. denied 355 U.S. 941 (1958). Moreover, in that case it appears, at 156, that the discount system employed by petitioner Edelmann was not the same as that of its two principal competitors and Edelmann did not establish that its lower price was made in good faith to meet a competitor's equally low price.

The Commission now relies on *C. E. Niehoff & Co.* v. *Federal Trade Commission,* 241 F. 2d 37 (1957) where we stayed the effective date of a Commission order, under the circumstances of that case, and its subsequent reversal, *sub nom, Moog Industries* v. *Federal Trade Commission, supra.* While we had affirmed the Commission's determination of statutory violation, we directed that the cease and desist order should take effect "at such time in the future" as we might direct and hence our order was reversed, as aforesaid. The Supreme Court, at 414, recognized that, if the Commission had patently abused its discretion in determining that its order should not be held in abeyance until respondent's competitors were proceeded against, a court of appeals might overturn the Commission's determination. That is the situation now before us.

Counsel for the Commission admit in their brief in this court "petitioner submitted specific information to the Commission tending to show current violation of Section 2(a) by two of its competitors" and that it also was "conducting another investigation of one of the companies, which, *although not involving* Section 2 (a) of the *Clayton Act,* might indicate whether that section was being violated." (Italics added.) This brought about the investigation by the antitrust division of the Department of Justice of those two competitors.

In the case at bar, it appears that, by letter dated *April 19, 1965,* Commission counsel wrote to petitioner's counsel herein that the reason the Commission would not *then* undertake any industry-wide investigation of petitioner's competitors was that such an investigation "would conflict with an investigation *now* being conducted by the Antitrust Division of the

Department of Justice". We are not impressed by this reference to a belated investigation conducted in *1965* which was many months after the proceeding before the Commission occurred and the entry of the orders of the Commission which we are now reviewing. Even if not tardy, such an investigation by the Department of Justice does not qualify as an investigation by the Commission, which, in our opinion, was the agency which was called upon to act in all matters pertaining to the case at bar. We hold that the duty of the Commission to bring into the case before it petitioner's powerful competitors could not be excused or condoned by the Commission asserting, after it had by its order condemned petitioner, that a branch of the executive department of the government had commenced an investigation.

An investigation of an industry is germane to a proceeding before the Commission, and it has a duty to so investigate in a proper case. We have already indicated our view that petitioner's showing was sufficient to require the Commission to make petitioner's competitors parties thereto. The Commission was the proper forum to receive and act upon the result of such an investigation. Recently, in an address before the Bar Association of the District of Columbia, Commissioner Jones (of the present Commission) stated February 25, 1965:

> Industry-wide enforcement of the law is almost a constitutional imperative as a matter both of fairness and equality before the law. It is clear that we have no right to and could not permit some law violators to go free while prosecuting others. * * *

For the reasons herein set forth, the order of the Commission entered August 4, 1964 is set aside and this cause is remanded for further proceedings as

prayed in the petition of Universal-Rundle Corporation filed July 20, 1964. We reserve our ruling on the petition to set aside the final order of June 12, 1964.

ORDER OF AUGUST 4, 1964 SET ASIDE AND CAUSE REMANDED, WITH INSTRUCTIONS.

RULING RESERVED AS TO ORDER OF JUNE 12, 1964.

A true Copy:
Teste:

. . . . . .

Clerk of the United States Court of Appeals for the Seventh Circuit.

United States Court of Appeals for the Seventh Circuit, Chicago, Illinois

Friday, October 22, 1965

Before Hon. F. RYAN DUFFY, Hon. ELMER J. SCHNACKENBERG, Hon. WIN G. KNOCH, *Circuit Judges.*

No. 14763

UNIVERSAL-RUNDLE CORPORATION, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

Petition for review of an order of the Federal Trade Commission

This cause came on to be heard on the petition for review of orders of the Federal Trade Commission and the record from the Federal Trade Commission, and was argued by counsel.

On consideration whereof, it is ordered by this Court that the order of the Federal Trade Commission entered August 4, 1964, be, and the same is hereby set aside, and that this cause be, and the same is hereby REMANDED to the Federal Trade Commission for further proceedings as prayed in the petition of Universal-Rundle Corporation filed July 20, 1964, in accordance with the opinion of this Court filed this day.

This Court reserves ruling on the petition to set aside the final order of June 12, 1964.

United States Court of Appeals for the Seventh Circuit, Chicago, Illinois

Friday, December 17, 1965

Before Hon. JOHN S. HASTINGS, *Chief Judge;* Hon. F. RYAN DUFFY, Hon. ELMER J. SCHNACKENBERG, Hon. WIN G. KNOCH, Hon. LATHAM CASTLE, Hon. ROGER J. KILEY, Hon. LUTHER M. SWYGERT, *Circuit Judges.*

No. 14763

UNIVERSAL-RUNDLE CORPORATION, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

Petition for review of an order of the Federal Trade Commission

IT IS ORDERED by the Court that the petition of the Federal Trade Commission for a rehearing *en banc* be, and the same is hereby DENIED.

(SWYGERT, C. J. voted to grant the petition for rehearing *en banc.*)

APPENDIX C

FEDERAL TRADE COMMISSION DECISIONS SINCE JANUARY 1, 1964, REFUSING TO STAY ORDERS

FTC docket No.	Title	Date of order	Synopsis
8093	*Chun King Sales, Inc.*	3- 4-64	Robinson-Patman case. The Commission denied respondent's motion to reopen, to vacate a cease-and-desist order or to stay the effective date of the order until such time as "its effect will not be to place respondent in an inequitable position competitively in the sale and distribution of the products covered by the order." Respondent alleged that "In the Oriental foods industry there are some sixteen competitors of varying sizes * * *."
7817	*United Biscuit Company of America.*	4-10-64	Robinson-Patman case. The Commission denied respondent's motion to withdraw and stay re-entry of its order "until a determination has been made as to whether the respondents in *National Biscuit Company*, Docket No. 5013, and *Sunshine Biscuits, Inc.*, Docket No. 6191, are in compliance with the respective cease and desist orders issued previously by the Commission against these companies."
8596	*Watchbands, Inc., et al.*	5-21-64	The Commission denied respondents' motion to vacate their default and to reinstate the case for trial on the merits, a cease and desist order having been issued on February 3, 1964. Respondents alleged, among other things, that "there are a number of manufacturers engaged in the watchband industry who are much larger manufacturers who have not been directed to cease and desist their importation of watchbands with the resultant discrimination against the respondent."
7462	*Pacific Molasses Company.*	7-20-64	Robinson-Patman case. The Commission denied respondent's request to reopen the proceedings on the ground, *inter alia*, that the order should be set aside because Pacific's principal competitor, Southwestern Sugar & Molasses Company, which was under a somewhat similar Commission order, had left the business and had been replaced by National Molasses Company, "against whom there is no cease and desist order."

FEDERAL TRADE COMMISSION DECISIONS SINCE JANUARY 1, 1964, REFUSING TO STAY ORDERS—Continued

FTC docket No.	Title	Date of order	Synopsis
7566	*Southern Fruit Distributors, Inc.*	3-11-65	Robinson-Patman case. The Commission denied respondent's petition to reopen, which was based on the Commission's decision in two other cases and the fact that "the continuation in force of this consent cease and desist order puts Southern Fruit at a real disadvantage vis-à-vis a competing company."
C-788	*Lafayette Radio Electronics Corp.*	3-24-65	The Commission denied respondent's motion to suspend the effectiveness of a consent order until similar orders are issued and become effective against three competitors.
8656	*Texas Industries, Inc.*	4-14-65	The Commission denied respondents' motions "to suspend the proceeding pending completion of an industry-wide investigation, inquiry, or other action by the Commission."
8657	*Mississippi River Fuel Corporation.*		
6048	*Schenley Industries, Inc., et al.*	10-25-65	The Commission denied respondents' petition to reopen based on the contention, among others, that respondents' "competitors are not under similar restrictions."
8038-A	*Graber Manufacturing Co., Inc., et al.*	12-13-65	Robinson-Patman case. The Commission denied respondents' motion to dismiss or suspend the proceedings, in which the respondents pleaded, among other things, that the Commission has issued a complaint in another, more comprehensive, action "involving in essence the very factors upon which liability is premised against the respondents herein."
C-607	*Dexcon Corporation, et al.*	1-19-66	The Commission denied respondents' motion, which contended in essence that the Commission's promulgation of Guides Against Deceptive Labeling and Advertising of Adhesive Compositions indicated an intention to deal with the matters involved on an industry-wide, voluntary-compliance basis, and that it would be inequitable to place respondents alone under an order before determining whether the industry guides would secure compliance.
File 661-0606	*Lehigh Portland Cement Company.*	3-3-66	The Commission denied (1) respondent's petitions to expedite the Commission's industry-wide inquiry and, pending promulgation of a policy to guide the industry, (2) to stay further action in the particular case.

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No. 101

In the Supreme Court of the United States

OCTOBER TERM, 1965

FEDERAL TRADE COMMISSION,
Petitioner,

vs.

UNIVERSAL-RUNDLE CORPORATION,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANK C. MCALEER
JAMES R. FRUCHTERMAN
120 South LaSalle Street
Chicago, Illinois 60603
Attorneys for Respondent

KAHN, ADSIT, ARNSTEIN, GLUCK,
WEITZENFELD & MINOW
120 South LaSalle Street
Chicago, Illinois 60603
Of Counsel

The Scheffer Press, Inc.—ANdover 3-6850

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965.

No. 1222

FEDERAL TRADE COMMISSION,

Petitioner,

vs.

UNIVERSAL-RUNDLE CORPORATION,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent, Universal-Rundle Corporation, respectfully files its brief in opposition to the petition for writ of certiorari and prays that said petition be denied because, as shall hereinafter be shown, there is no reason to grant the said writ.

Jurisdiction

The petition herein was filed on April 15, 1966. On April 21, 1966, Mr. Justice Clark extended the time in which to file this opposing brief until June 20, 1966.

Counter-Statement of Question Presented

Whether the Court should grant certiorari to review a holding by the Court of Appeals that the Federal Trade

Commission by ignoring the overriding policy of the amended Clayton Act had patently abused its discretion in refusing to stay, temporarily, a price discrimination cease and desist order issued against respondent, a small plumbing fixture manufacturer, for engaging in an industrywide practice, while simultaneously refusing to take any action concerning such practices by the dominant manufacturers in the industry, especially when the Court of Appeals' decision does not require the FTC to take any action in this case which is not consistent with the FTC's actions in other industries, namely, to proceed in accordance with that Agency's announced policy of seeking industrywide compliance where violations are industrywide in scope.

Statement

The Federal Trade Commission entered a cease and desist order against respondent, Universal-Rundle Corporation, on June 12, 1964. The sole basis for the order, as stated in the Commission's accompanying opinion, was that respondent had violated Sec. 2(a) of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. 13(a), by granting discounts from its published wholesaler net prices in connection with sales of plumbing fixtures made in truckload quantities (R. 30-45).[1] The Federal Trade Commission limited its evidence to a showing that respondent had three customers who on a total of seven occasions during 1957 (the year covered by the evidence) bought in truckload quantities and received truckload discounts. Although respondent manufactured and offered for sale several hundred different products, truckload discounts were shown to have been granted on just seventeen different model plumbing

[1] "R" refers to the "Appendix to Brief for Petitioners" filed by respondent in the court below.

fixtures. (Comm. Exhs. 80A through 89Z14, Comm. Exhs. 75 and 76).

On July 20, 1964 respondent, following the procedure approved by the Federal Trade Commission itself,[1] moved the Commission to stay the effective date of the cease and desist order for at least eighteen months in order that the Commission might investigate and take whatever action it deemed appropriate against respondent's competitors for engaging in the practice of granting truckload discounts. Completely consistent with the position taken by it during the course of the trial,[2] respondent asserted that its six major competitors were granting truckload discounts on sales of plumbing fixtures made in such quantities. The FTC was shown that respondent's market share affected by the order was less than 6%, while, as a group, four of its competitors' share was approximately 66%. The leading company's share was approximately 32% (R. 50).

Respondent attached to this petition documentary proof in the form of price lists by these competitors containing their wholesale net prices for plumbing fixtures, plus bulletins issued by these manufacturers offering truckload discounts which averaged approximately 18% below

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[1] The Commission has ruled that a request for a stay of the effective date of an order on the grounds that competitors are engaging in the challenged practice is premature when made prior to the entry of a cease and desist order. *In re Admiral Corporation*, 56 F.T.C. 1627, 1629-30 (1959).

[2] The statement on page 3 of the petition that respondent in requesting the stay was "alleging for the first time that the granting of truckload discounts was an industry-wide practice" is in error. (R. 457).

their published wholesale net prices.[1] The authenticity of this documentary material is not challenged. Respondent also attached to its request for a stay an affidavit executed by its Vice-President in Charge of Sales to the effect that the said competitors were in fact granting the 18% truckload discounts; that each of the competitors had two or more customers in the several trading areas of the country, some of whom did not buy in truckload quantities; and that unless the Commission took some action respondent would be the only member of the industry under a cease and desist order and would suffer competitively as a result thereof[2] (R. 54-56).

Respondent did not ask that the cease and desist order against it be held in abeyance until its competitors were placed under similar orders, or that the eventual enforcement of the cease and desist order against it be made contingent upon the Commission's success in proceedings against respondent's competitors. Respondent asked only that the effective date of the order against it be stayed for a specified time period pending an investigation by the Commission of its competitors. So confident was respondent that the Commission would follow its an-

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[1] The petition (at pp. 3-4) undertakes to describe the documentary material attached to respondent's request for a stay, but neglects to mention that the truckload discount bulletins issued by respondent's competitors showed an average discount of 18%. Based on the record in the instant case, the FTC had found respondent's truckload discounts which averaged 10% were sufficient to cause the probability of competitive injury on the buyer level. (R. 43)

[2] It was also brought to the Commission's attention that respondent had incurred substantial losses, exceeding $500,000, during each of the three years immediately preceding the entry of the order, as contrasted to the substantial profits of its dominant competitors (R. 51-52).

nounced policy (see pp. 16-20, *infra*), once it had investigated these other industry members, and treat it in a completely fair and equitable manner, that respondent agreed to forgo its right to judicial review of the order against it if the requested relief were to be granted (R. 46-47).

The Federal Trade Commission refused to grant the requested relief on the ground that respondent's showing was insufficient to warrant the Commission's taking any action. In denying the stay, no finding was made that there might be an adverse effect on competition if the effective date were postponed. In its order denying respondent's request, the FTC took the position that before that Agency would be justified in commencing an investigation of respondent's competitors, it would be necessary for respondent to submit to it evidence probative of every element of a *prima facie* case and, in addition, to submit evidence tending to negate the existence of possible affirmative defenses.[1] While the Court of Appeals did not criticize the Commission for this part of its ruling, respondent respectfully submits that the Federal Trade Commission, the Court of Appeals and this Court know full well that these are not the standards usually applied by the FTC in determining

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[1]The FTC's order, in pertinent part, reads:

". . . It must be determined in each case whether the discount creates a price difference, whether the recipient of such a discount is competing at the same functional level with a customer paying a higher price, whether the customer buying in less than truckload quantities is able to avail itself of a truckload discount, and whether the differential is sufficient in the competitive conditions shown to exist to have the required anti-competitive effects. Moreover, even if a prima facie violation of Sec. 2(a) is established, the seller may in each case interpose the statutory defense to justify the discrimination." (R. 63)

whether to investigate claimed violations of Section 2(a) of the Act.[1] If they were, the FTC would still be waiting to commence the first Robinson-Patman investigation.

In reviewing the Commission's refusal to stay the effective date of its cease and desist order and the Commission's refusal to take any action with regard to respondent's competitors, the Court of Appeals ruled that respondent had made a "strong showing" that its competitors were currently engaging in the same practice as was found to be illegal when done by respondent. The Court of Appeals ruled that under these circumstances the Commission's flat refusal to take any action concerning respondent's competitors was a patent abuse of its administrative discretion because such a refusal was inconsistent with the overriding policy of the Clayton Act, stating:

> "We are not convinced that the Clayton Act requires us to approve the imposition of sanctions upon only one of the smallest of a group of law violators. If we did, the giants in the field would be the real benefactors—not the public."
>
> (352 F. 2d 831, at 834)

The Court of Appeals further ruled that respondent's showing was sufficient to place upon the Commission a

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[1] The FTC in its ruling said it must be determined "whether the customer buying in less than truckload quantities is able to avail itself of the truckload discount, . . ." (R. 63). The FTC didn't have to conduct an investigation to determine this point with regard to respondent's competitors' customers. The record shows that five of the six customers the FTC deemed incapable of buying in truckloads from respondent, also contemporaneously bought plumbing fixtures from one or more of the six competitors (R. 250; R. 384; R. 408; R. 480; R. 481-2).

duty to investigate and that it could not condone the Commission's refusal to perform that duty (352 F. 2d 831, at 835).

Reasons for Denying the Writ

The decision of the Court of Appeals is simply a proper application of a well-settled principle that it is a patent abuse of administrative discretion for an agency to make a decision which is inconsistent with the overriding legislative purpose sought to be attained by the enactment of the statute whose enforcement Congress has entrusted to the agency. In the recent case of *NLRB* v. *Brown,* 380 U.S. 278 (1965), this Court ruled:

> "Reviewing courts are not obligated to stand aside and rubber stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the Congressional policy underlying a statute. Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions." (380 U.S. 278, 291-292)

The permissible latitude for the exercise of discretion by an administrative agency is not so unlimited so as to permit an agency to "lose sight of the law". *General Protective Committee, etc.* v. *S. E. C.,* 346 U.S. 521, 536 (1954). This Court has also ruled that agency actions which are not in conformance with the overriding standard laid down by Congress for that agency are not legitimate exercises of administrative discretion. *Burlington Truck Lines* v. *United States,* 371 U.S. 156, at 167 (1962).

The case at bar was brought by the Federal Trade Commission under its statutory authority and duty to enforce the provisions of the amended Clayton Act. That the overriding purpose of this Act, as well as all the antitrust statutes, is to preserve the competitive process as

the cornerstone of the nation's economic system is so well established that for respondent to embark upon a discussion of the legislative policy sought to be effectuated by these laws would be but to belabor the obvious. The Court of Appeals has found that the Commission's order denying respondent's request for a stay and its concomitant refusal to make any investigation of respondent's dominant competitors, would benefit only the "giants in the field". It is clear that the "giants in the field" would "benefit" from respondent being under a final order. To comply with this order, respondent must drop those customers unable to buy in truckloads. This would further decrease respondent's small market share, and quite obviously increase the existent substantial market shares of the dominant competitors who are free to sell at the higher less-than-truckload prices to these former customers. Obviously, the antitrust laws were not enacted to attain such an objective. The petition not only fails to take issue with this holding, which serves as the keystone of the Court of Appeals' decision, *it doesn't even bother to mention it.*

Rather than discuss anything as insignificant as the basic underlying purpose of the Clayton Act, the petition takes the position that this Court laid down a well-nigh inflexible rule in the consolidated cases of *Moog Industries, Inc.* v. *F.T.C.* and *F.T.C.* v. *C. E. Niehoff & Co.* 355 U.S. 411 (1958), to the effect that Courts of Appeals may not interfere with Federal Trade Commission decisions denying stays of the effective dates of cease and desist orders. In its treatment of this Court's *Moog-Niehoff* decision, the petition overlooks entirely the factual background present in those cases, as well as the rationale underlying the decision.

Moog and *Niehoff* were just two of a large number of cases involving annual volume rebates in the "auto parts"

industry. The Federal Trade Commission had already investigated the industry, *as an industry,* and brought cases against those companies found to be granting annual volume rebates.[1]

The critical question in *Moog-Niehoff* was whether a cease and desist order should go into effect against one competitor prior to the time at which other competitors, *who were already being prosecuted or investigated,* were brought under similar orders. This Court held that it would unduly hamper the Commission in the performance of its duty if the Commission under such circumstances could issue only simultaneous cease and desist orders. What was at issue in *Moog-Niehoff,* then, was the Commission's discretion in setting up its own timetable. No issue was raised in those cases relating to a refusal on the part of the Federal Trade Commission to take any action against competitors of the respondents therein.

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[1] The Court's attention is invited to the Commission's brief filed with this Court in *F.T.C.* v. *Niehoff & Co.,* October Term 1957, No. 110. Therein (at p. 19) it is stated: "Respondent [Niehoff] is not in a position to complain that the Commission made it a legal guinea pig. Within a relatively short time before or after the filing of the complaint against [Niehoff] the Commission filed 14 Section 2(a) complaints against members of the automotive replacement parts industry. Courts of Appeals have affirmed the . . . orders issued in six of these proceedings . . . Two of the orders were against companies engaged in selling ignition line parts and named by respondent as competitors." (Footnotes omitted.) At the time of this Court's decision in *Niehoff,* a third competitor was under an order and three others had been cited in F. T. C. price discrimination complaints. See: *Standard Motor Products,* 54 F. T. C. 814; *Guaranteed Parts Co., Inc.,* 53 F. T. C. 433; and *Thermoid Company,* 55 F. T. C. 518.

The Federal Trade Commission itself has asked this Court to recognize the distinction between "timetable" cases—that is to say, cases wherein proceedings have already been brought against a number of competitors—as opposed to cases wherein one member of an industry has been singled out. In a brief filed on behalf of the Commission in this Court less than six months ago in the case of *United Biscuit Company of America* v. *F. T. C.*,[1] the following statement appears:

> "Thus, this is not a situation in which petitioner has been singled out for enforcement action while other important members of the industry engaging in similar practices are ignored." (Brief for the Federal Trade Commission in Opposition, Case No. 888, October Term, 1965, p. 10)

Thus, in a case wherein the same issue—the holding in abeyance of a price discrimination order—was raised, this Court was asked to take note that the discriminator's competitors had been prosecuted, and were under orders to cease and desist. Yet in the case at bar the entire tenor of the FTC's petition is to the effect that the refusal to investigate, much less prosecute, respondent's competitors is without any significance whatsoever. The total lack of consistency between these two positions is manifest.

This Court's *Moog-Nichoff* opinion strongly supports the Court of Appeals decision herein. While the petition

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[1] Certiorari was denied on Feb. 28, 1966, ... U.S. ....., 15 L.Ed. 2d 845. United was the last of five biscuit product manufacturers placed under 2(a) orders for an industry-wide practice. *United Biscuit Co.* v. *F. T. C.*, 350 F. 2d 615 (1965). See *National Biscuit Co.*, 50 F. T. C. 932, *Sunshine Biscuit Co.*, 52 F. T. C. 110; *Shultze & Burch Biscuit Co. and Robert A. Johnston Co.*, 1963-1965, Tr. Reg. Rep., Transfer Binder § 16,749.

would stress the limitation placed upon Courts of Appeals in that opinion, it ignores entirely this Court's views as to just what the Federal Trade Commission's duties are in a situation such as the one presented in the case at bar.

In *Moog-Nichoff*, this Court held that the Commission had a *duty to investigate competitors to determine if proceedings were warranted.* The opinion states:

> "... although an allegedly illegal practice may appear to be operative throughout an industry, *whether such appearances reflect fact* and whether all firms in the industry should be dealt with in a single proceeding or should receive individualized treatment *are questions that call for discretionary determinations by the administrative agency.*" (355 U.S. 411, at 413, emphasis supplied)

Can the Commission in the instant case be fairly considered to have made the "discretionary determination" referred to in the above quoted passage of the *Moog-Nichoff* decision? Is a flat refusal to even look at respondent's dominant competitors' pricing practices the equivalent of a "discretionary determination"? Obviously, the Court of Appeals thought not. In this regard it is highly significant to note that the Court of Appeals in this case did not command the Commission to hold the order against respondent in abeyance until similar orders were entered against respondent's competitors, but merely held that the Commission, following the showing made by respondent, had an obligation to make an investigation. The Court of Appeals' ruling reads as follows:

> "An investigation of an industry is germaine to a proceeding before the Commission and it has a duty to so investigate in a proper case. We have already indicated our view that petitioner's [respondent's] showing was sufficient to require the Commission to

make petitioner's competitors parties thereto. The Commission was the proper forum to receive and act upon the result of such an investigation." (352 F. 2d 831, at 835).

Respondent respectfully submits that the Court of Appeals holding only requires the Federal Trade Commission to ascertain the facts which it must of necessity have in order to make the discretionary determination which this Court in *Moog-Niehoff* ruled was incumbent upon it.[1] The Commission's refusal to perform that duty is clearly contrary to this precedent and is a patent abuse of administrative discretion.

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[1] The FTC has expressly recognized the necessity for making such a discretionary determination in a case presenting a similar situation to the one at bar. Thus, in *Atlantic Products Corp. and Atlantic Products Sales Corp.*, ... F. T. C. ..... (1963), FTC Doc. 8513, 1963-1965, Tr. Reg. Rep., Transfer Binder, § 16,676, the Commission ruled as follows:

> "Responsible exercise of the Commission's discretion in determining whether, and when, not to enter an immediate cease and desist order so that a general practice may be dealt with more comprehensibly, may involve consideration of the circumstances going beyond those reflected in the particular record. In the circumstances here, we are inclined to withhold entry of a cease and desist order against the instant respondent pending the outcome of the projected industrywide proceeding."

In the case at bar, even though a strong showing[1] had been made that this respondent's larger competitors were engaged in granting truckload discounts, the exact practice concerning which a violation upon respondent's part had been found, the Federal Trade Commission refused to even investigate respondent's claims. This, in effect, was a decision upon the part of the Commission to ignore these competitors.

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[1] The petition confines its challenge to the Court of Appeals' conclusion that a "strong showing" as to respondent's competitors' pricing tactics had been actually made to a footnote on page seven of the petition. Therein it is claimed that respondent didn't actually prove that the granting of truckload discounts by its competitors was illegal. Such a position, we submit, is almost ludicrous. Respondent has no power to subpoena witnesses and compel the production of documents for this purpose. Respondent did show by documents issued by its competitors, that these companies were, in fact, offering truckload discounts far in excess of those condemned by the FTC in the instant case. Certainly this was sufficient, especially in view of the circumstance that the FTC had already condemned this practice when done by one member of the same industry, to give the FTC ample reason to believe that respondent's competitors might be violating the law. *Respondent is confident that the Federal Trade Commission really doesn't mean to imply to this Court that it never undertakes investigations except when some complainant presents it with an airtight, open and shut case.*

Next, it is claimed in the same footnote that respondent grants truckload discounts on its full line of fixtures in any combination, whereas every other manufacturer grants truckload prices on only a few specified items. Neither the Federal Trade Commission nor the Court of Appeals considered this point since it was never raised until a petition for rehearing was filed in the latter forum. This belated claim ignores the affidavit of respondent's Vice President (which could have been, but was not, controverted either before the Commission or the Court of Appeals) to the effect that it was his belief that competitors were, in fact, granting truckload discounts on all fixtures which they offered for sale (R. 54-56).

A decision to prosecute one law violator while simultaneously refusing to do anything about similar violations on the part of the violator's dominant competitors is grossly unfair. The FTC by its actual Robinson-Patman Act enforcement programs since this Court's decision in *Moog-Niehoff,* and its reports to the Congress, as well as in numerous speeches by the Commission Chairman and other present members of the FTC, has recognized the

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[1] (Continued)

In this footnote it is further claimed that the showing made by respondent in its petition for a stay is weakened by the fact that its stated market share (5.75%) did not include sales made by it to Sears, Roebuck and Co. The omission of the Sears' sales in this figure was clearly stated to the Commission in respondent's original request for a stay and had no apparent bearing on the Commission's decision (R. 50). Just wherein its significance lies is not explained in the petition.

Finally, in this footnote it is inferred that respondent might have misled the Commission and that the Court of Appeals erred, in connection with the number of manufacturers in the plumbing fixture industry (R. 50). The petition cites a pamphlet issued by the Bureau of Census which supposedly proves that there are at least 68 companies in the plumbing fixture manufacturing business (U. S. Department of Commerce, Bureau of Census, *Current Industrial Reports, Plumbing Fixtures,* Second Quarter 1965 (September 9, 1965)). The cited pamphlet was *not* introduced in evidence in this proceeding, but was first cited in the F T C's petition for rehearing before the Court of Appeals wherein the same claim was asserted. This pamphlet explicitly states that the statistics therein contained are compiled not only from manufacturers of vitreous china and cast iron bathroom and kitchen plumbing fixtures, the only products with which the instant proceeding is concerned, but also includes statistics relating to manufacturers of concrete, earthenware, aluminum, monel, metal, and other type fixtures, including drinking fountains, laundry set tubs and shower stall bottoms. Respond-

unfairness inherent in such conduct. The petition cannot cite a single precedent since *Moog-Niehoff* in which the FTC has singled out one company—much less one of the smallest in an industry—for engaging in an industrywide pricing practice, entered a final order against only that

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[1] (Continued)
ent submits that although such products may be generically classified as plumbing fixtures for purposes of Census reports, they are not competitive with the products sold by the seven companies referred to in the Court's decision. In any event, the number of competitors, standing alone, is a relatively meaningless statistic in evaluating competitive conditions. This Court has long been in agreement with the position espoused by both the Federal Trade Commission and the Department of Justice that it is the *degree of concentration* which is the most appropriate barometer of the state of competition in a given industry. *No challenge* has ever been made as to the correctness of respondent's assertion that the four leading plumbing fixture manufacturers enjoy 66% of the industry's volume.

On the question of degree of concentration in the plumbing fixture industry, it is interesting to note the court's decision in *Briggs* v. *Crane,* 185 F. Supp. 177 (E.D. Mich. 1960), aff'd 280 F. 2d 747 (6th Cir., 1960). The District Court, in enjoining Crane from acquiring Briggs' stock, found that the plumbing fixture industry was "highly concentrated" (Briggs' and Crane's combined share was about 16%), fixture manufacturers were limited to "approximately 10 companies" and no new manufacturer had entered during the previous 10-year period (185 F. Supp. 177, at 184). The F T C's *amicus* brief on behalf of Briggs did not contend there were 68 plumbing fixture manufacturers in 1960. Respondent submits this Court would be on safe grounds in concluding there is little likelihood that some 58 companies have commenced manufacturing plumbing fixtures in the six years since the District Court in *Briggs* found the plumbing fixture industry "highly concentrated".

company, and refused to take any action against others in the same industry for a similar illegal practice.[1]

A review of the cases instituted by the FTC since *Moog-Niehoff* shows the FTC has, in fact, adopted a policy for Robinson-Patman Act enforcement and that policy is an industrywide approach whenever the FTC has reason to believe that competitors are engaging in similar pricing practices in violation of the Act. Certainly the FTC cannot suggest that the 11 complaints, all issued on the same day, challenging the same practice on the part of magazine publishers, occurred through sheer coincidence.[2] Similar treatment has been accorded to competitors in the Florida citrus fruit industry (over 90 orders),[3] in the garment industry (over 220 orders,[4] in the carpet industry (11

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[1] Appendix C to the petition lists five Robinson-Patman Act decisions in which stays of orders have been denied. In none of these cases did the FTC enter an order against only one company and refuse to investigate others in the same industry engaged in the same pricing practice. In *United Biscuit Co.*, *Pacific Molasses,* and *Southern Fruit,* competitors of the cited companies were under final orders at the time the stays were denied. In *Graber Mfg. Co.* no order has yet been entered against that respondent. As to *Chun King Sales,* some three years after consenting to the entry of an order (58 F. T. C. 81), Chun King requested a stay in what appears to have been an obvious attempt to avoid a penalty proceeding for violations of the final order. (See: Trade Reg. Rep., Vol. 3, § 9701.40 (1965)—reporting that penalties of $70,000 for violations of the order were imposed on Chun King.)

[2] 57 F. T. C. 13 through 52.

[3] Table of Commodities Index, 57 F. T. C. through 60 F. T. C.

[4] 1963-1965 Trade Reg. Rep., Transfer Binder §§ 16,468, 16,534 and 16,702.

orders),[1] the tobacco industry (5 orders),[2] the electric shaver industry (4 orders),[3] in the toy industry (at least 16 orders),[4] and the sea food products industry (23 orders).[5] These are but a few examples which show that the FTC is enforcing the Robinson-Patman Act on an industrywide basis. Thus, the Court of Appeals' decision does not require the FTC to embark upon some new or radical procedure but only calls for that Agency to consistently apply the very policy which it has already been following. The FTC has obviously deemed industrywide enforcement as the "policy best calculated to achieve the ends contemplated by the Congress" (*Moog-Niehoff* 355 U.S. 411 at 413), and it has not shown in its petition why that policy should not have been followed here.

The FTC in its statements to the Congress has stressed the inherent unfairness of enforcing the Act on a single competitor basis. In a recent statement prepared for the House Committee on Appropriations the FTC made the following report:

> "In enforcing the Robinson-Patman amendment to the Clayton Act . . . the FTC is tackling the problems on an industrywide basis if possible.
>
> "A key to the Commission's new approach is more careful planning of how best to cope with illegalities. Instead of shooting first and analyzing later, criteria are being further developed in our case selection to assure that we are not simply spending money and racking up statistics without commensurate results. *Simple fairness to competing business demands:* First, an analysis of the illegality to determine its character and prevalence; second, a determination of the amount

[1] 1963-1965 Trade Reg. Rep., Transfer Binder ¶6,800.
[2] 56 F. T. C. 221, 258, 263, 269 and 275.
[3] 55 F. T. C. 655, 665, 682, and 1017.
[4] 61 F. T. C. 629.
[5] 55 F. T. C., Table of Commodities Index, at p. 2166.

of public interest involved; third, that consideration be given to correcting, if possible, the illegality by illuminating it for all concerned or by accepting from violators their assurance the violation will be discontinued; and, finally, should these informal efforts fail (or be deemed insufficient), then to strike quickly at the *defiant* violator with the full force of the law. Such planning will enable the F.T.C. to husband its adversarial resources to attack hardcore violators. . . ."[1] (Emphasis supplied)

The Chairman of the FTC in his testimony before this House Subcommittee elaborated even further, stating:

"We have given a mandate to our enforcement bureaus. Instead of taking these cases as they come, one by one, the first thing they are to determine is whether or not this is an isolated situation that has come to our attention or whether it is something that is engaged in competitively by all the competitors. If so, to step back and, then with our resources, engage in what I would hope to be some basic planning and determine which would be the best tool and approach for us to take. . . ."

"Historically, the Commission was wedded to the procedure of taking our customers or their cases as they came. The Commission had hoped . . . that with the tools that Congress had afforded the Commission to work with that even on the case by case method that proceeding against one, the others, if it affected them, would take notice and follow suit. It just didn't work that way . . . . *It could be said in all fairness to these people that if there were 50 engaged in the same practice, what certainty would a party have that if they stopped, the other 49 would stop.* In our country,

[1] FTC Statement, Hearings before a Subcommittee of the Committee on Appropriations, House of Representatives, Independent Offices, 89th Congress, 1st Session, Part 3, pp. 408-409. See also: Hearings before Subcommittee of the Committee on Appropriations, United States Senate, 89th Congress 1st Session, pp. 828-30.

very rarely can a man be his brother's keeper. I think this is the basis of law. We are trying to enforce our law in the American way, equitably and fairly." (at pp. 404-405) (Emphasis supplied)

The Commission's reasons for this enforcement program have been lucidly explained in several speeches by the Chairman of the Federal Trade Commission as well as other members of that Agency.[1] Chairman Dixon, in a recent address,[2] informed a group of American businessmen:

> "It must be recognized that some illegal practices are so widespread within an industry that to single out a few of the sinners would be *unfair. Simple justice would dictate* that the approach to the problem be of sufficient scope to give all violators an opportunity to rid themselves of the illegality simultaneously and without suffering competitive injury in the process." (Emphasis supplied)

In the same vein Chairman Dixon has recently stated, "The man who is willing to comply with the law simply can't afford to if his competitor is allowed to go on violating it."[3]

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[1] For the convenience of the Court, a copy of each of the speeches referred to in this Brief is being filed with the Clerk of the Court simultaneously with the filing of this opposing brief.

[2] Address by Paul Rand Dixon, Chairman of FTC, before Georgia Association of Broadcasters, Inc., Pine Mountain, Georgia, June 15, 1965.

[3] *Voluntary Law Enforcement: An Approach to "Administrative" Delay,* an address by Paul Rand Dixon, Chairman of the FTC, Briefing Conference on Restraint of Trade and Trade Regulations, Shoreham Hotel, Washington, D.C., March 17, 1965. See also a recent address of Commissioner Everett MacIntyre on *Some Criteria for Applying Industrywide Enforcement Measures under the Robinson-Patman Act,* before the Indiana Continuing Legal Education Forum, Notre Dame University, September 25, 1965.

Commissioner Mary Gardiner Jones of the present Commission, in a recent address before the Bar Association of the District of Columbia (February 25, 1965,) stated as follows:

> "Industrywide enforcement of the law is almost a constitutional imperative as a matter both of fairness and for equality before the law. It is clear that we have no right to and could not permit some violators to go free while prosecuting others."

Obviously, if this announced policy of taking an industrywide approach is the manner in which the Federal Trade Commission is enforcing the Act, there should be no occasion for cases presenting the factual situation present in the case at bar to arise in the future and, thus, no reason for this Court to review a decision wholly compatible with the FTC's policy.

In summary, it is respectfully submitted the FTC has not set forth any compelling reason why this Court should grant a writ of certiorari. The petition never questions the basic rationale underlying the decision of the lower court that the FTC's refusal to take any action against respondent's competitors is inconsistent with the overriding purpose of the Clayton Act. It sidesteps this point and instead attempts to create a non-existent conflict between the holding of this Court in *Moog-Niehoff* and the Court of Appeals' holding in the instant case. As shown above, no such conflict exists. The *Moog-Niehoff* ruling is limited to preserving to administrative agencies discretion in choosing the "policy best calculated to achieve the ends contemplated by the Congress" (355 U.S. 41, at 413). Nothing, however, in that decision countenances the adoption of a procedure which not only frustrates the Congressional purpose, but also is inherently unfair and

acknowledged to be so by the FTC itself in reporting to the Congress.[1]

CONCLUSION

The petition for certiorari should, therefore, be denied.

Respectfully submitted,

FRANK C. MCALEER
JAMES R. FRUCHTERMAN
120 South LaSalle Street
Chicago, Illinois 60603
Attorneys for Respondent

KAHN, ADSIT, ARNSTEIN, GLUCK,
WEITZENFELD & MINOW
120 South LaSalle Street
Chicago, Illinois 60603
Of Counsel.

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[1] On the final page of the petition an argument is presented to the effect that "sound judicial administration requires" that the Court of Appeals first render a decision as to the validity of the Commission order before making a determination that the Commission abused its discretion by refusing to stay that order. Such an argument suggests that the Commission's hands are tied to a case by case approach in enforcing the Act and the FTC should never attempt industrywide enforcement until a final judicial determination is rendered in at least one proceeding against a member of the affected industry. This argument might have merit if in the proceeding below respondent had challenged, on legal grounds, the Commission's substantive theory of violation. No such challenge was made. The thrust of respondent's attack on the validity of the order itself was basically centered on the sufficiency of the evidence to support the FTC's findings. A decision on merits, therefore, should have no effect on the FTC's substantive theory of violation, nor, for that matter, on future efforts of the FTC to enforce the law in the plumbing fixture industry.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 101

FEDERAL TRADE COMMISSION, PETITIONER

v.

UNIVERSAL-RUNDLE CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (R. 569–575) is reported at 352 F. 2d 831. The opinion of the Commission accompanying its cease-and-desist order (R. 30–45) is reported at Trade Reg. Rep. (Transfer Binder 1963–1965) ¶ 16,948, and the Commission's order denying a stay (R. 62–63) is reported at Trade Reg. Rep. (Transfer Binder 1963–1965) ¶ 16,998.

JURISDICTION

The judgment of the court of appeals was entered on October 22, 1965 (R. 576), and a timely petition for rehearing *en banc* was denied on December 17, 1965 (R. 577). Mr. Justice Clark extended the time

for filing a petition for a writ of certiorari to April 16, 1966 (R. 578), and the petition was filed on April 15, 1966. This Court granted the petition on October 10, 1966 (R. 579). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

The pertinent provisions of Section 2 and Section 11 of the Clayton Act, as amended, are set out in Appendix A, *infra*, pp. 29–31.

QUESTION PRESENTED

Whether the court of appeals exceeded its authority as a reviewing court by postponing the operation of a Federal Trade Commission cease-and-desist order, without passing on its validity, until the Commission had investigated the trade practices in question on an industry-wide basis.

STATEMENT

Respondent manufactures a full line of vitreous china and cast iron plumbing fixtures. It sells its "Homart" brand fixtures, which constitute a substantial portion of its production, exclusively to Sears, Roebuck & Company, and its "U–R" brand fixtures to independent wholesalers and dealers throughout the United States. In a complaint issued August 4, 1960 (R. 1–3), the Federal Trade Commission charged that respondent violated Section 2(a) of the Clayton Act, as amended, 15 U.S.C. 13(a) (Appendix A, *infra*, p. 29) by charging preferred purchasers of "U–R" products substantially lower prices than those charged non-favored customers. On June 12, 1964,

the Commission sustained the charge,[1] finding that respondent offered "truckload discounts" ranging from 5 to 15 percent[2] on its full line of vitreous china and cast iron products and that, in light of the relative competitive positions of respondent's customers, the effect of the price discrimination resulting from respondent's discounts may be substantially to lessen competition among these customers (R. 38–39). Accordingly, the Commission ordered respondent to refrain from discriminating in price among competing purchasers of its products (R. 28, 29).[3]

On July 20, 1964, respondent petitioned the Commission (R. 46–53) to stay its order for a sufficient time to permit the agency to investigate and institute appropriate proceedings with respect to what respondent alleged to be "the industry-wide practice by plumbing fixture manufacturers of granting discounts

[1] The complaint had also charged that respondent sold "Homart" products to Sears (which owns a majority of respondent's stock) for less than it sold the corresponding "U–R" products to other customers. The Commission dismissed this charge on the ground that "Homart" and "U–R" fixtures were not of like grade and quality (R. 31–34).

[2] Because a truckload purchase may consist of any combination of fixtures (R. 569–570), the resulting discounts for each purchase vary from order to order (R. 18–20). On the average, the discounts equal about 10 percent (R. 43).

[3] The order (R. 28) directs respondent to cease and desist from:

> Discriminating in price by selling "Universal-Rundle" brand or Universal-Rundle manufactured plumbing fixtures (exclusive of the "Homart" brand sold to Sears, Roebuck & Co.) of like grade and quality to any purchaser at prices higher than those granted any other purchaser, where such other purchaser competes in fact with the unfavored purchaser in the resale or distribution of such products.

in prices on truckload shipments" (R. 47). The petition alleged that, unless this relief were granted, respondent would operate under a "competitive disadvantage and extreme hardship" and probably would suffer a "substantial decline in * * * sales volume" (R. 47). In support of the petition, an affidavit of one of respondent's vice-presidents alleged that respondent's six major competitors were each granting truckload discounts on some of their plumbing fixtures—as revealed by their price lists, which were appended to the affidavit (R. 521–555)—and that he had been informed that some competitors granted discounts of 15 to 20 percent on their entire line in certain areas of the country (R. 54–55).

On August 4, 1964, the Commission denied respondent's petition, stating that "the general allegation by respondent that its competitors are granting truckload discounts is not a sufficient basis for instituting industry-wide proceedings to condemn this practice nor is it a valid reason for withholding enforcement of the order entered against respondent in this matter" (R. 63). The Commission explained that it had not ruled truckload discounts unlawful *per se* but that their lawfulness depends upon a determination in each case "whether the discount creates a price difference, whether the recipient of such a discount is competing at the same functional level with a customer paying a higher price, whether the customer buying in less than truckload quantities is able to avail itself of the truckload discount, and whether the differential is sufficient in the competitive conditions shown to exist to have the requisite

anticompetitive effects" (R. 63). The Commission also noted that it would have to take account in each case of statutory justifications offered by the seller. Finally, the Commission indicated that it was not persuaded, by respondent's allegations, that undeferred enforcement of the order against it would cause financial hardship.

Respondent petitioned the court of appeals for review of both the Commission's cease-and-desist order and its order denying the stay. While the case was pending in the court of appeals, respondent's counsel conducted correspondence with an attorney in the Commission's Bureau of Restraint of Trade.[4] In response to respondent's letter of November 16, 1964, inquiring whether an investigation of its competitors' truckload discounts had been undertaken (Appendix C, *infra*, pp. 35–36), the Commission attorney replied, on December 2, 1964, that the agency would not commit its resources to such an investigation unless respondent presented specific information tending to show a greater likelihood that its competitors were violating Section 2(a). The Commission attorney detailed the type of data which would be useful and invited respondent to submit such information (*id.*, pp. 37–38).

After further exchanges of letters, in which the Commission attorney reiterated his invitation to respondent to submit specific data and noted that, if the data were available at all, they would probably be known to respondent and its agents (*id.*, pp. 44, 49–50),

[4] Copies of the relevant portions of this correspondence, which does not appear in the printed record, are printed in Appendix C, *infra*, pp. 35–55.

respondent, on March 4, 1965, submitted some additional information with respect to the customers of two of its competitors (*id.*, pp. 52–53). On March 12, 1965, the Commission attorney acknowledged respondent's letter and indicated that he would prepare a recommendation regarding possible action in light of the additional information and that, in this connection, a further elaboration on the information provided by respondent would be helpful (*id.*, p. 54). On April 19, 1965, the Commission attorney informed respondent's counsel that the Commission would not investigate its competitors' pricing practices at that time because the Department of Justice had advised that such an investigation would conflict with one then being conducted by the Department's Antitrust Division (*id.*, p. 55).[5]

The court of appeals, without determining the validity of the Commission's cease-and-desist order, set aside the denial of the stay. Relying on the allegations in respondent's petition for a stay and its accompanying affidavit, the court found that the Commission had adopted an "inequitable approach" to "an

[5] This investigation, which commenced between February and June 1964, resulted in the filing of two criminal indictments and a civil complaint in the Western District of Pennsylvania on October 6, 1966. The indictments allege that all of the major manufacturers of plumbing fixtures (including respondent and the six companies of which it had complained to the Commission) were engaged in a continuing conspiracy, from September 1962 until some time in 1966, to fix the price of such fixtures. All defendants entered pleas of not guilty on November 15, 1966, and the cases are now pending. *United States* v. *American Radiator & Standard Sanitary Corp., et al.*, Civ. No. 66–1184; *id.*, Crim. No. 66–295; *United States* v. *Plumbing Fixtures Manufacturers Ass'n, et al.*, Crim. No. 66–296 (W.D. Pa.).

industry-wide problem" by proceeding against "a comparatively small manufacturer, when its larger and more guilty competitors are not prosecuted" (R. 573). It ruled that the Commission had a "duty * * * to bring into the case before it [respondent's] powerful competitors * * *" (R. 574–575). Referring to the correspondence mentioned above,[6] the court stated that the Justice Department's investigation, "even if not tardy * * * does not qualify as an investigation by the Commission, which, in our opinion, was the agency which was called upon to act in all matters pertaining to the case at bar" (R. 574). Accordingly, the court held that the Commission's denial of a stay was a "patent" abuse of discretion within the meaning of *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411, and remanded the case to the Commission for further proceedings "as prayed in the petition of Universal-Rundle Corporation filed July 20, 1964" (R. 575). On December 17, 1965, the Court (Judge Swygert, dissenting) denied a petition for rehearing *en banc* (R. 577).

SUMMARY OF ARGUMENT

The court of appeals' ruling that the Commission was required to stay its order until it had conducted an industry-wide investigation is contrary to this Court's decision in *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411. There, where the

[6] Although none of the correspondence was in the record (see n. 4, *supra*, p. 5), respondent included excerpts from the initial letters exchanged (Appendix C, *infra*, pp. 35–38) in its brief in the court of appeals, and, in an addendum thereto, referred to the letter advising of the Justice Department's investigation (*id.*, p. 55).

allegations of the companies involved were similar to, but stronger than, those of respondent here, the Court upheld the denial of stays. It ruled that the question whether Commission orders "should be held in abeyance until the respondents' competitors are proceeded against is for the Commission to decide" and that the Commission's "discretionary determination should not be overturned in the absence of a patent abuse of discretion" (355 U.S. at 413–414).

The sound principles governing the relationship between courts and administrative agencies which underlay the *Moog* decision should have been, but were not, applied here. The fact that no proceedings have been instituted against others in an industry is no bar to the enforcement of an administrative order against one found guilty of a statutory violation. And the deference that a reviewing court should accord the ancillary features of an agency's orders is particularly great where, as here and in *Moog,* the court's modification of the Commission's order involves an attempt to supervise the agency's investigation and enforcement policies. These policies involve the evaluation of varied and complex factors, not susceptible of detailed judicial review.

Departing from the principles of *Moog,* the court below undertook for itself the Commission's task of finding economic facts and evaluating competing economic interests. The court's findings, however, were based solely on the inadequate allegations in respond-

ent's petition and are not supported by the record. More important, the court wholly failed to consider one of the most significant factors relevant to the decision whether to order a stay—*i.e.*, the adverse effects on respondent's unfavored customers resulting from the court's failure to require respondent to discontinue what had already been administratively determined to be unlawful price discrimination. Moreover, the court's error in staying the Commission's order until the agency had conducted an industry-wide investigation was compounded by its failure to determine the validity of that order. This practice was inconsistent both with the court's obligation promptly to review Commission orders and with sound judicial administration.

In accordance with *Moog,* the court should have limited itself to determining whether the Commission's denial of the stay was patently arbitrary. On this record, we submit, the court could not have properly made such a finding.

Respondent's allegations were belated and inadequate. It was reasonable for the Commission, in determining the optimum allocation of its available funds and personnel, to require respondent to come forward with sufficient information before committing its own resources to an investigation of other plumbing manufacturers. Indeed, after several exchanges of letters with a Commission attorney, respondent ultimately did supply some information as to the custom-

ers of two of its competitors. The Commission's refusal to undertake an investigation at that time was not unreasonable in light of a pending Justice Department investigation of the industry, which resulted in criminal indictments against respondent and all its major competitors. Surely the Commission should not have been compelled to engage in any activity—such as the use of compulsory processes conferring immunity upon witnesses—which would have interfered with such a proceeding. Finally, the Commission did not abuse its discretion in ruling that respondent had failed to make an adequate showing that immediate enforcement of the order would cause it serious competitive injury. Not only were respondent's allegations on this point sketchy and conclusory, they were in striking contrast to respondent's contention—strongly urged during the proceedings on the merits—that it was weeding out customers who did not buy in truckload quantities. If this contention was correct, the Commission order obviously imposed little obstacle to respondent's continuing to offer truckload discounts.

This Court's standard for judicial interference with the agency's enforcement policy—a patent abuse of discretion—bespeaks an extraordinary case, one in which the agency's action is so arbitrary or oppressive that no reasonable justification for it can be found. Certainly, this is not such a case. Here the Commission gave proper consideration to the question, raised by respondent's petition, whether immediate enforcement against one member of an industry is appropriate. Its discretionary determination in this case was not

improper. Indeed, if the kind of showing that respondent made here *required* the Commission to proceed on an industry-wide basis, the Commission would have little opportunity to exercise the discretion which is of the essence of its enforcement determinations. As this Court recognized in *Moog,* to impose such a requirement would seriously undermine the Commission's effectiveness.

ARGUMENT

THE COURT OF APPEALS EXCEEDED ITS AUTHORITY AS A REVIEWING COURT BY POSTPONING THE OPERATION OF THE COMMISSION'S CEASE-AND-DESIST ORDER, WITHOUT PASSING ON ITS VALIDITY, UNTIL THE COMMISSION HAD CONDUCTED AN INDUSTRY-WIDE INVESTIGATION

In *Moog Industries, Inc.* v. *Federal Trade Commission,* 355 U.S. 411, this Court held that the question whether Commission orders "should be held in abeyance until the respondents' competitors are proceeded against is for the Commission to decide" (355 U.S. at 413–414). There, as here, companies[7] ordered to cease and desist from giving discriminatory discounts which the Commission had found violative of Section 2(a) sought to stay the Commission's orders until their competitors—who they alleged were engaging in the same discount practices—were

[7] In *Moog*, the Court affirmed the Eighth Circuit's denial of a stay in *Moog Industries, Inc.* v. *Federal Trade Commission*, 238 F. 2d 43, and reversed the stay order entered by the Seventh Circuit in *C. E. Niehoff & Co.* v. *Federal Trade Commission*, 241 F. 2d 37.

proceeded against. One of the companies asserted that it was unfair to enforce the Commission's order against it since it accounted for only 1 percent of the sales in the "industry"; the other alleged that its market share was less than one-half of 1 percent and that "it would have to go out of business" if the Commission's order were not stayed (355 U.S. at 412).

Recognizing that "in the shaping of its remedies within the framework of regulatory legislation, an agency is called upon to exercise its specialized, experienced judgment," this Court held (*id.* at 413):

> * * * Thus, the decision as to whether or not an order against one firm to cease and desist from engaging in illegal price discrimination should go into effect before others are similarly prohibited depends on a variety of factors peculiarly within the expert understanding of the Commission. Only the Commission, for example, is competent to make an initial determination as to * * * whether or not the nature of * * * competition [in the relevant industry] is such as to indicate identical treatment of the entire industry by an enforcement agency. Moreover, *although an allegedly illegal practice may appear to be operative throughout an industry, whether such appearances reflect fact and whether all firms in the industry should be dealt with in a single proceeding or should receive individualized treatment are questions that call for discretionary determination by the administrative agency.* It is clearly within the special competence of the Commission to appraise the adverse effect on competition that might result from post-

> poning a particular order prohibiting continued violations of the law. * * * [Emphasis supplied.]

Thus, the Court concluded, the Commission's discretionary determination not to stay the effectiveness of a particular order may "not be overturned in the absense of a *patent* abuse of discretion" (*id.* at 414; emphasis supplied).

In the present case, although respondent made a weaker showing than the private parties in *Moog*, both as to the likelihood that its competitors were engaged in similar illegal practices and as to the detriment it allegedly would suffer from enforcement of the order,[8] the court below—relying on *Moog*—

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[8] C. E. Niehoff & Co. had offered much evidence, during the initial procedings before the hearing examiner, as to competitive conditions and the discount practices of other manufacturers. Its contention that it was unfair to proceed against it and not the others was vigorously made before the hearing examiner as well as before the Commission. It claimed a miniscule market share (½ of 1 percent) and alleged that it would have to go out of business if the Commission entered an order against it which was immediately effective. See Record, pp. 941–944, 953–956, 975–977, *Federal Trade Commission* v. *C. E. Niehoff & Sons*, No. 110, Oct. Term, 1957.

In contrast, respondent in the present case offered no evidence on this issue at the hearing and claimed only that, if the order were not stayed, it would probably suffer a "substantial decline in * * * sales volume" (R. 47), not that it would go out of business. Contrary to respondent's contention (Br. in Opp., pp. 8–10) *Moog* did not turn on the fact that the Commission had instituted investigations against some—but by no means all—of the companies' competitors. This Court did not even mention this fact in its opinion; rather it addressed itself to the contentions of the private parties there, which were essentially the same as respondent's contentions here.

declared the Commission's refusal to grant a stay "a patent abuse of discretion" (R. 573). This ruling was erroneous. As we shall show, the principles governing the relationship between courts and administrative agencies, on which *Moog* rests, require reversal of the decision below.

1. Congress has "placed the primary responsibility for fashioning orders upon the Commission." *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 429. The Commission, like other administrative agencies under comparable statutes, has wide discretion in selecting the necessary and appropriate remedy for an unlawful practice, and a reviewing court may interfere only if the Commission has "abused its discretion." *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 611–612; *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 726; *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473. The deference due agency orders—which extends to such "ancillary features" (*Moog*, 355 U.S. at 411) as the time when the order is to take effect—is especially great where, as here, the court's modification of the Commission's order involves an attempt to supervise the agency's investigation and enforcement policies.

It is well settled that an administrative order directed against a statutory violation is not rendered invalid or unenforceable by reason of the fact that no administrative proceedings have been instituted against similarly situated competitors of the party bound by the order. See *United States* v. *Wabash Railroad Co.*, 321 U.S. 403; *Federal Trade Commis-*

sioner v. *Keppel & Bro.*, 291 U.S. 304, 308–309; 312–313. Enormous practical problems of effective enforcement would arise if the Commission were obliged "to decline to enforce [the law] against one because it could not at the same time enforce it against all" (*United States* v. *Wabash Railroad Co., supra,* at 414). Moreover, the Commission's utilization of its resources for investigation and enforcement is an administrative, not a judicial, function. The factors governing such utilization are numerous and complex, and the reasons underlying the agency's decision to follow one enforcement course rather than another are not susceptible of detailed judicial review. As one commentator has observed, judicial superintendence of administrative enforcement policies "through the device of the stay may well be a crude, ill-informed, and destructive interference with the agency's plan." Jaffe, *Judicial Control of Administrative Action* 700 (1965). The courts' role is properly limited to correcting patently arbitrary or oppressive administrative conduct.

2. These sound principles, which underlay this Court's decision in *Moog* (see pp. 12–13, *supra*), should have been, but were not, applied by the court of appeals in the present case. Respondent's allegations were similar to—but weaker than—those of the companies involved in *Moog*. And the two major dissimilarities between this case and *Moog*—the intervening Justice Department investigation with which the requested Commission investigation might have conflicted and the court's failure to pass on the merits of the Commission's order—compounded the

lower court's departure from this Court's ruling.

a. The court's holding that the Commission was duty-bound to proceed on an industry-wide basis, like respondent's petition for a stay, was premised on two largely factual assumptions: that respondent's competitors were "more guilty" than respondent in violating Section 2(a) and that respondent would suffer "competitive disadvantage and extreme hardship" if it were proceeded against alone (R. 47, 573). In making these determinations the court undertook—we submit improperly—to find economic facts and to evaluate competing economic interests. This venture was clearly contrary to *Moog,* and its results sharply demonstrate the soundness of the *Moog* decision.

The court below ignored this Court's admonition in *Moog* that "although an allegedly illegal practice may appear to be operative throughout an industry," it is for the Commission to determine "whether such appearances reflect fact" (355 U.S. at 413). The Commission had made clear, in its original opinion and in its order denying the stay, that truckload discounts were not unlawful *per se* and that respondent's discounts on its full line of vitreous china and cast iron fixtures violated Section 2(a) only because of their practical impact on particular non-favored customers in particular cities. Nevertheless, the court found that respondent's competitors were "more guilty" solely because their average truckload discounts were larger than respondent's (R. 573). But respondent did not allege that any major competitor was offering truckload discounts on its entire line,

as was respondent, and the price lists and bulletins it submitted showed that these competitors offered truckload discounts on only a relatively few items in their broad lines (R. 520, 526–527, 540, 550). More importantly, there was no information before either the court or the Commission which would indicate that these competitors' limited discounts had the adverse secondary-line impact which was the gravamen of the Commission's charge against respondent.[9] The court's assumption that the agency had improperly failed to respond to "an industry-wide problem" (R. 573) was not warranted by the record.

Nor was it proper for the court to undertake an evaluation of the "adverse effect on competition that might result from postponing a particular order prohibiting continued violations of the law" (*Moog*, 355 U.S. at 413). The court based its conclusion that it was unfair to enforce the order against respondent solely on respondent's allegation that it was one of the

[9] On the theory that the Commission applied to respondent, the mere showing that a competitor offered some truckload discounts did not indicate a violation of the Act. For example, a particular competitor may have chosen to deal only with the larger retailers and distributors which are capable of purchasing in truckload quantities. Respondent itself indicated that this would have been a sound business practice (see p. 24, *infra*). Or a manufacturer may sell to small customers, but only in a particular market where they are not in competition with a large purchaser which avails itself of the discount. Moreover, even if a discrimination between competing customers were demonstrated, it would not necessarily violate Section 2(a), for the seller may have a valid defense—for example, that its truckload discount does no more than make due allowance for a lower cost of distributing the larger quantity. Clayton Act § 2(a), 15 U.S.C. 13(a).

smallest firms in the industry, its market share being only 5.75 percent. But this figure did not take account of respondent's substantial sales to Sears (R. 50, n. 5) or of the possibility that respondent's competitive posture in certain areas of the country might be stronger than its figures suggest. Moreover, the court wholly failed to take account of the adverse effects on respondent's unfavored customers resulting from the failure to require respondent to discontinue what had already been administratively determined to be unlawful price discrimination. This Court's ruling in *Moog* made clear that it is within the province of the Commission to weigh the primary-line effects of denying a stay against the secondary-line effects of granting it.[10] Thus, the court not only erred in making an economic judgment which should properly have been left to the Commission; in doing so, the court failed to consider one of the most significant factors relevant to such a judgment.

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[10] As one commentator noted (*The Supreme Court, 1957 Term*, 72 Harv. L. Rev. 77, 133 (1958)):

> Although enjoining a company from competing by means of discriminatory prices may destroy it and thus may injure competition, it is by no means clear that sparing this company would justify the injury that might occur at the secondary level of competition. Purchasers who must pay the higher price to the price discriminator may be driven out of business during the period within which the order is held in abeyance, an evil that was uppermost in the mind of Congress at the time the Robinson-Patman Act was passed.

See also, Comment, *Abuse of Discretion: Administrative Expertise vs. Judicial Surveillance*, 115 U. Pa. L. Rev. 40, 43–44 (1966), criticizing the court of appeals' decision in the present case.

The court's error in undertaking for itself tasks properly left to the Commission was compounded by its failure to determine the validity of the cease-and-desist order before deciding whether to stay it. By failing to pass upon the validity of the order the court departed from its statutory obligation promptly to dispose of appeals from Commission orders (15 U.S.C. 21(e)).[11] Moreover, sound judicial administration requires that the reviewing court decide the validity of an order before considering whether it should become effective. For if the order is found invalid, there is no occasion to decide whether it should be stayed. In addition, the decision below could result in a serious and unnecessary waste of the Commission's resources, since, after lengthy industry-wide proceedings in the pattern of the present case, the court of appeals might then rule that the agency's substantive theory is erroneous or that the standards of evidence applied by it were improper.

b. Properly limited, in accordance with *Moog,* the court's function was to determine the validity of the Commission's order and whether its denial of the stay was patently arbitrary or unreasonable. On this record, we submit, the court could not have properly found that the Commission had abused—much less "patently" abused—its discretion.

[11] By reserving its ruling on respondent's petition to set aside the final order against it, the court prevented the order from becoming effective because it does not become final for enforcement purposes until the court of appeals has acted upon it. See Section 11(g) of the Clayton Act, as amended by the Finality Act of 1959, 73 Stat. 244, 15 U.S.C. 21(g).

Respondent, unlike the respondent in *Moog* (see n. 8, *supra,* p. 13), made no claim that the practice with which it was charged was industry-wide in scope until after a cease-and-desist order had been entered against it.[12] Even though it had asserted a defense that it was meeting competition (R. 7), it made no substantial effort to establish this defense before the hearing examiner (see R. 457–462). If respondent believed that the Commission should have been proceeding against others in the industry simultaneously with its case, it never communicated that view to the Commission while the record was open. Instead it adopted, and the court of appeals condoned, a practice which, if followed in the future, would seriously delay Commission proceedings.

When, more than a month after a cease-and-desist order had been entered against it, respondent suggested that an industry-wide investigation was in order, its showing was not such as to have compelled the Commission to accept its suggestion. This is not to say that a respondent must establish a conclusive case against its competitors in order to justify

[12] Contrary to respondent's contention (Br. in Opp., p. 3), *Admiral Corporation*, 56 F.T.C. 1627, 1629–1630, does not sanction the procedure followed here. That case held only that a motion for suspension or postponement would be premature until a cease-and-desist order were actually entered, and that a respondent thus could not adduce evidence relevant to such a motion by subpoena in the main proceeding. There is nothing in *Admiral* to suggest, however, that a respondent should withhold information already within its possession and then, after the Commission's decision on the merits, confront it for the first time with the suggestion that the problem is industry-wide in scope and not susceptible to case-by-case adjudication.

the Commission's institution of an industry-wide investigation. The Commission has never taken such a position. Its decision not to stay its order here merely reflected the fact that respondent had offered no clear indication (1) that the truckload discounts offered by other manufacturers may have actually resulted in unlawful price discrimination among competing purchasers or (2) that it would suffer sufficient competitive injury outweighing the competitive injury its price discrimination inflicted on non-favored customers.

The Commission could reasonably have assumed that the information which might have established the likelihood that the discounts of respondent's competitors caused competitive injury to some of their purchasers, if available at all, could easily have been obtained by respondent—either from its agents or through its other regular sources of information about competitive conditions in the industry. In fact, after several exchanges of letters, respondent did supply information concerning the customers of two of its competitors. To be sure, the Commission could have conducted its own investigation to determine whether additional information was available tending to show violation of Section 2(a) by others in the industry. But, after examining respondent's petition and affidavits and the general sources of information about the industry available to it (such as the file of complaints by members of the public), it was reasonable for the Commision to conclude that such investigation would not represent a profitable or useful expenditure of its limited investigative resources. As *Moog* makes

clear, the Commission has the right "to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically" (355 U.S. at 413). In this case the Commission made the judgment that it could better serve the public interest by pursuing other investigations where there was greater likelihood of developing evidence of statutory violation. It was reasonable for the Commission to require respondent to come forward with sufficient information before committing its own resources to an investigation of other plumbing-fixture manufacturers.

Even assuming, as the court below apparently did (R. 574), that respondent had supplied sufficient information in its letter of March 4, 1965 (Appendix C, *infra,* pp. 52–53), to indicate that two of its competitors were offering illegal discounts, the Commission's refusal to institute an industry-wide investigation at that time was not unreasonable in light of the pending Justice Department investigation of the industry. As this Court has recognized, Congress intended the Commission and the Department of Justice to function as effective partners, rather than rivals, in the enforcement of the antitrust laws (see *Federal Trade Commission* v. *Cement Institute,* 333 U.S. 683, 692–693), and the agencies have devoted much effort to achieving optimum coordination of their activities. See *Report of the Attorney General's National Committee To Study the Antitrust Laws* 374–377 (1955). Contrary to what the court below apparently believed, the Commission did not seek to transfer enforcement of Section 2(a) to the Justice Department; rather it

merely noted that any Section 2(a) investigation it might undertake might conflict with the Department's broader investigation.[13] As we have noted (*supra*, n. 5, p. 6), the Justice Department's investigation resulted in criminal indictments charging all the major participants in the industry (including respondent and the two competitors against which it complained) with participation in a pervasive conspiracy to fix prices, extending from 1962 to 1966. Surely the Commission should not have been compelled to engage in any activity—such as the use of compulsory processes conferring immunity upon witnesses—which would have interfered with such a proceeding.

Regardless of the effect of the Justice Department's investigation, however, and regardless of whether respondent (in its application for a stay or its subsequent correspondence) sufficiently indicated the existence of industry-wide violation of Section 2(a), the Commission did not abuse its discretion in ruling that respondent failed to establish that the immediate enforcement of the order would cause it serious competitive injury. See *Clinton Watch Co.* v. *Federal Trade Commission*, 291 F. 2d 838, 841, (C.A. 7). Respondent's showing on this point was brief and conclusory;[14] it entirely lacked any specific informa-

[13] For example, a corporate official subpoenaed to testify in a Commission proceeding would be immune from prosecution "for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it" (Federal Trade Commission Act, Sec. 9, 15 U.S.C. 49).

[14] Basically, it consisted of the following statement in the

tion about competitive conditions, the areas in which respondent would suffer, or the nature and impact of the pricing practices respondent could adopt under the order. The absence of such specific data to support its assertion of competitive injury is particularly striking in view of one contention which respondent strongly urged during the proceedings on the merits—*i.e.*, that, because of the unprofitability of selling to customers who did not purchase in truckload quantities, it was in the process of weeding out such customers and limiting itself to larger dealers (see R. 444). If respondent was indeed interested in serving only the large customers, the Commission order obviously imposed little obstacle to its continuing to offer truckload discounts.

3. This Court's standard for judicial interference with agency enforcement policy—a patent abuse of discretion—bespeaks an extraordinary case, one in which the agency's action is so arbitrary or oppressive that no reasonable justification for it can be found. Certainly this is not such a case. The situation here is typical of numerous cases in which a respondent seeks to defer the effectiveness of a

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affidavit of respondent's vice-president (R. 55–56):

> That based upon his knowledge of the competitive conditions in this industry, if respondent is not permitted to sell plumbing fixtures with a differential in price as are its competitors on truckload and less-than-truckload quantities, respondent's sales of plumbing-fixtures under the "U/R" brand will be substantially decreased and lost to its competitors, who continue to offer substantial discounts on truckload shipments. And he is of the further belief that the company may suffer further substantial financial losses if it must be the sole plumbing-fixture manufacturer under an order to cease and desist.

cease-and-desist order, and thus continue its unlawful practice, by claiming the Commission's order, if allowed to become immediately effective, would place it under a handicap *vis-à-vis* its competitors. See, *e.g.*, *United Biscuit Co. of America* v. *Federal Trade Commission*, 350 F. 2d 615 (C.A. 7), certiorari denied, 383 U.S. 926; *W.M.R. Watch Case Corp.* v. *Federal Trade Commission*, 343 F. 2d 302 (C.A. D.C.), certiorari denied, 381 U.S. 936; *Heavenly Creations, Inc.* v. *Federal Trade Commission*, 339 F. 2d 7 (C.A. 2), certiorari denied, 380 U.S. 955; *The Regina Corp.* v. *Federal Trade Commission*, 322 F. 2d 765, 769 (C.A. 3).

It is the Commission's practice, prior to issuing any complaint, to consider whether the practice involved would more suitably be dealt with through some form of industry-wide proceeding.[15] Pursuant to this practice, it has instituted[16] or refused to institute[17] such proceedings, depending on the particular circumstances. Even after the Commission determines that enforcement on a case-by-case basis is most appropriate, it carefully considers whether it should stay orders against particular respondents in the light of supervening decisions or evidence that competitors in an industry are engaging in similar practices. In some cases, it has granted such stays (see, *e.g.*, *Atlantic Products, Inc.*, F.T.C. Docket No. 8513, Nov. 19,

[15] See Hearings before a Subcommittee of the Committee on Appropriations, House of Representatives, 89th Cong., 1st Sess. (Independent Offices, Part 3), pp. 408–409.

[16] See, *e.g.*, *Transogram Co., Inc.*, 61 F.T.C. 629.

[17] See *Callaway Mills Co.*, FTC Docket No. 7634, Feb. 10, 1964.

1962; Rowe, *Price Discrimination Under the Robinson-Patman Act* 518–519 (1962 ed.), 159 (Supp. 1964)); in others it has denied them.[18]

It was quite proper for the Commission, in the exercise of its discretion, to conclude that the order in this case should not be stayed. If the kind of showing that respondent made here *required* the Commission to proceed on an industry-wide basis, the Commission would indeed have little opportunity to exercise the discretion which is of the essence of its enforcement of the act. The result would be seriously to undermine the Commission's effectiveness; as a practical matter a rigid requirement of simultaneous enforcement against all would frequently lead to effective enforcement against none.

This Court recognized in *Moog* that the formulation of a flexible enforcement policy, guided by an expert knowledge of competitive conditions, was committed by Congress to the Commission. The Court properly noted the dangers of judicial interference

[18] The Commission's records show that since January 1, 1964, there have been at least thirteen other cases, including six under the Robinson-Patman Act, in which the Commission has denied applications for stays such as respondent's. In some of these cases the Commission also had proceeded against a respondent's competitors; in others it had not done so. Synopses of these decisions are set forth in Appendix B, *infra*, pp. 33–34. In other cases, it should be noted, the Commission has granted relief from its orders or dismissed complaints on the basis of intervening decisions involving a respondent's competitors. *E.g.*, *Plough, Inc.*, FTC Docket No. 8563, April 30, 1964 (dismissing complaint); *Towel Shop*, FTC Docket No. 7533, June 4, 1964 (modifying cease and desist order).

in this area and limited judicial authority to an appropriately narrow compass. That decision is wholly applicable here and requires reversal of the court of appeals' stay of the Commission's order.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and the case remanded for a determination of the merits of the Commission's order.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

DONALD F. TURNER,
Assistant Attorney General.

JEROME I. CHAPMAN,
Assistant to the Solicitor General.

HOWARD E. SHAPIRO,
MILTON J. GROSSMAN,
Attorneys.

JAMES MCI. HENDERSON,
General Counsel,

J. B. TRULY,
Assistant General Counsel,

W. RISQUE HARPER,
Attorney,
Federal Trade Commission.

DECEMBER 1966.

APPENDIX A

Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13, provides in part:

> (a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or * * * and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *
>
> (b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, how-*

ever, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

Section 11 of the Clayton Act, as amended by the Act of December 29, 1950, 64 Stat. 1127, and by the Finality Act of 1959, 73 Stat. 243, 15 U.S.C. 21, provides in part:

(b) Whenever the Commission * * * shall have reason to believe that any person is violating or has violated any of the provisions of sections 2, 3, 7, and 8 of this Act, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. * * * If upon such hearing the Commission * * * shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations. * * *

(c) Any person required by such order of the commission or board to cease and desist from any such violation may obtain a review of such order in the court of appeals of the United States for any circuit within which such violation occurred or within which such person resides or carries on business, by filing in the court, within sixty days after the date of the service of such order, a written petition praying that the order of the commission or board be

set aside. * * * Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the commission or board until the filing of the record, and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the commission or board, and enforcing the same to the extent that such order is affirmed, and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the commission or board as to the facts, if supported by substantial evidence, shall be conclusive. * * *

* * * * *

(e) Such proceedings in the court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. * * *

* * * * *

(g) Any order issued under subsection (b) shall become final—

(1) upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the commission or board may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b); or

(2) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the commission or board has been affirmed, or the petition for review has been dismissed by the court of appeals, and no petition for certiorari has been duly filed; * * *.

APPENDIX B

FEDERAL TRADE COMMISSION DECISIONS SINCE JANUARY 1, 1964, REFUSING TO STAY ORDERS

FTC docket No.	Title	Date of order	Synopsis
8093	*Chun King Sales, Inc.*	3- 4-64	Robinson-Patman case. The Commission denied respondent's motion to reopen, to vacate a cease-and-desist order or to stay the effective date of the order until such time as "its effect will not be to place respondent in an inequitable position competitively in the sale and distribution of the products covered by the order." Respondent alleged that "In the Oriental foods industry there are some sixteen competitors of varying sizes * * *."
7817	*United Biscuit Company of America.*	4-10-64	Robinson-Patman case. The Commission denied respondent's motion to withdraw and stay re-entry of its order "until a determination has been made as to whether the respondents in *National Biscuit Company*, Docket No. 5913, and *Sunshine Biscuits, Inc.*, Docket No. 6191, are in compliance with the respective cease and desist orders issued previously by the Commission against these companies."
8596	*Watchbands, Inc., et al.*	5-21-64	The Commission denied respondents' motion to vacate their default and to reinstate the case for trial on the merits, a cease and desist order having been issued on February 3, 1964. Respondents alleged, among other things, that "there are a number of manufacturers engaged in the watchband industry who are much larger manufacturers who have not been directed to cease and desist their importation of watchbands with the resultant discrimination against the respondent."
7462	*Pacific Molasses Company.*	7-20-64	Robinson-Patman case. The Commission denied respondent's request to reopen the proceedings on the ground, *inter alia*, that the order should be set aside because Pacific's principal competitor, Southwestern Sugar & Molasses Company, which was under a somewhat similar Commission order, had left the business and had been replaced by National Molasses Company, "against whom there is no cease and desist order."
7604	*Dayco Corporation.*	8- 5-64	Robinson-Patman case. The Commission, in issuing the order to cease and desist, denied respondent's request for a stay which asserted that it will be placed at a great competitive disadvantage until the Commission proceeds against competitors who grant similar discounts.

FEDERAL TRADE COMMISSION DECISIONS SINCE JANUARY 1, 1964, REFUSING TO STAY ORDERS—Continued

FTC docket No.	Title	Date of order	Synopsis
7866	*Southern Fruit Distributors, Inc.*	3-11-65	Robinson-Patman case. The Commission denied respondent's petition to reopen, which was based on the Commission's decision in two other cases and the fact that "the continuation in force of this consent cease and desist order puts Southern Fruit at a real disadvantage vis-à-vis a competing company."
C-788	*Lafayette Radio Electronics Corp.*	3-24-65	The Commission denied respondent's motion to suspend the effectiveness of a consent order until similar orders are issued and become effective against three competitors.
8656	*Texas Industries, Inc.*	4-14-65	The Commission denied respondents' motions "to suspend the proceeding pending completion of an industry-wide investigation, inquiry, or other action by the Commission."
8657	*Mississippi River Fuel Corporation.*		
6048	*Schenley Industries, Inc., et al.*	10-25-65	The Commission denied respondents' petition to reopen based on the contention, among others, that respondents' "competitors are not under similar restrictions."
8038	*Graber Manufacturing Co., Inc., et al.*	12-13-65	Robinson-Patman case. The Commission denied respondents' motion to dismiss or suspend the proceedings, in which the respondents pleaded, among other things, that the Commission has issued a complaint in another, more comprehansive, action "involving in essence the very factors upon which liability is premised against the respondents herein."
C-607	*Dexcon Corporation, et al.*	1-19-66	The Commission denied respondents' motion, which contended in essence that the Commission's promulgation of Guides Against Deceptive Labeling and Advertising of Adhesive Compositions indicated an intention to deal with the matters involved on an industry-wide, voluntary-compliance basis, and that it would be inequitable to place respondents alone under an order before determining whether the industry guides would secure compliance.
File 661-0806	*Lehigh Portland Cement Company.*	3- 3-66	The Commission denied (1) respondent's petitions to expedite the Commission's industry-wide inquiry and, pending promulgation of a policy to guide the industry, (2) to stay further action in the particular case.
C-229	*George Frost, et al.*	8-10-66	The Commission denied respondents' petition to reopen and set aside which alleged, among other things, that action had not been taken against their competitors.

APPENDIX C

CORRESPONDENCE BETWEEN COUNSEL FOR RESPONDENT AND COUNSEL FOR THE COMMISSION [1]

NOVEMBER 16, 1964.

HON. PAUL RAND DIXON,
Chairman, Federal Trade Commission,
Washington, D.C.

DEAR CHAIRMAN DIXON: On August 4, 1964, the Commission denied a petition filed on July 20, 1964, for a stay of the Commission's secondary line 2(a) order entered on June 12, 1964 against Universal-Rundle Corporation.

The stay was requested to permit the Commission to investigate the industry-wide practice by plumbing fixture manufacturers of granting truckload discounts. Accompanying the petition were price lists of each of Universal-Rundle's principal competitors showing that each such fixture manufacturer currently charged approximately 18% less for certain plumbing fixtures shipped in truckload quantities than the prices charged for identical fixtures shipped in less than truckloads.

In Docket 8070 the Commission concluded that a truckload differential by Universal-Rundle Corporation averaging only 10% between customers reselling at the same functional level, was sufficient to cause the probability of competitive injury and was an illegal price discrimination when one or two of respondent's

[1] Parts of this correspondence, not related to the present case, have been omitted. These parts concern information relating to another Commission investigation which is confidential, under Rule 1.133 of the Commission's rules of practice.

customers in a single trade area could not avail themselves of the lower truckload price.

In denying respondent's petition, the Commission clearly indicated that the higher truckload discounts of 18% of American Standard, Elger, Crane Co., Briggs Mfg. Co., Kohler and Rheem Mfg. Co. were prima facie illegal, provided (a) a customer buying in truckloads competed with a customer buying at the higher truckload price, and (b) the less than truckload customer was unable to avail itself of the truckload discount because quantities involved were beyond such a customer's buying capabilities. In substance therefore, while the Commission refused to stay the order in Docket 8070, in doing so it isolated the precise factual information needed to proceed against respondent's competitors for engaging in the identical pricing practice for which Universal-Rundle Corporation was placed under an order.

As counsel for Universal-Rundle Corporation, it is requested that you advise us at your earliest convenience of the specific action which has been taken by the Commission to obtain the factual information the Commission indicated was necessary before any proceedings were considered under Section 2(a) of the Act against Universal-Rundle's competitors, the present status of an industry-wide investigation with regard to these pricing practices, and when the Commission may be expected to complete such an investigation.

* * * * *

Very truly yours,

FRANK C. MCALEER
(For Kahn, Adsit & Arnstein).

DECEMBER 2, 1964.

Re Corresp. File No. 7493.
FRANK C. MCALEER, Esquire,
Kahn, Adsit & Arnstein,
120 South LaSalle Street,
Chicago, Illinois. 60603.

DEAR MR. MCALEER: Your letter to the Chairman dated November 16, 1964, has been referred to me. In that letter you requested advice of the specific action which has been taken by the Commission regarding allegations by your client, Universal-Rundle Corporation, respondent in Docket 8070, that competitors are granting truckload discounts in connection with the sale of plumbing fixtures * * *

With reference to the first portion of your letter, you were, of course, advised by our answer to your petition for a stay of the order in Docket 8070 that the Commission's staff is not aware of any information indicating that there is a reasonable probability that any other manufacturer is selling plumbing fixtures at truckload discounts to jobbers who in fact compete with other jobbers buying fixtures from the same manufacturer and who are economically precluded from purchasing in truckload lots. We were cognizant of the affidavit of your client's vice president, attached to your original petition. That affidavit, however, merely stated that, because other manufacturers' published price lists provide truckload discounts, such manufacturers "may" be selling fixtures at different prices to competing purchasers.

If your client possesses any more concrete information indicating that any other manufacturer is in fact selling plumbing fixtures at truckload discounts to some customers while other competing customers are economically precluded from buying in such quantities, you are invited to submit such information, and

we shall gladly consider this matter further. I would strongly suggest that any such further information include the specific trading areas wherein the alleged discriminations are resulting.

In the present posture of this matter, however, an investigation such as you requested would require that a substantial portion of the Commission's limited funds and manpower be committed to a nationwide investigation of the pricing practices of some six major plumbing fixture manufacturers, each of which apparently deals with hundreds of customers. It is not considered appropriate to make such a commitment on the bare possibility that published price lists "may" be resulting in sales at different prices to competing purchasers somewhere in the United States. Not the least of the reasons underlying our reluctance to initiate an investigation such as you requested solely on the basis of the information thus far submitted by your client is our understanding that plumbing fixture manufacturers generally direct their principal sales efforts toward accounts which are capable of purchasing a substantial portion of their requirements in truckload quantities.

* * * * *

Very truly yours,

STANLEY M. LIPNICK.

JANUARY 4, 1965.

STANLEY M. LIPNICK, Esq.,

Trial Attorney, Bureau of Restraint of Trade, Federal Trade Commission, Washington, D.C.

DEAR MR. LIPNICK: I have received your letter of December 2, 1964, but due to my extended absence from the city I have been unable to respond until this time.

Your December 2, 1964 letter was in reply to our inquiry requesting information with respect to the action the Commission has taken to investigate the industry-wide practice by plumbing fixture manufacturers of granting truckload discounts, brought to the attention of the Commission on July 20, 1964.

In your December 2, 1964 letter you advised me, as counsel for Universal-Rundle Corporation, respondent in Docket 8070 that the Commission has neither undertaken, nor does its presently intend to institute, any investigation of Universal-Rundle's competitors for engaging in the precise discriminatory pricing practice which the Commission ruled was a violation of Section 2(a) of the amended Clayton Act by our client. We had previously furnished the Commission with price lists of U–R's six competitors, showing that these plumbing fixture manufacturers granted average truckload discounts of approximately 18% to buyers of such quantities. An average truckload discount by Universal-Rundle of but 10% in 1957 was sufficient for the Commission to conclude in its June 1964 opinion in Doc. 8070 that competition on the buyer level was adversely affected.

In your letter you state it is "our understanding that plumbing fixture manufacturers generally direct their principal sales efforts toward accounts which are capable of purchasing a substantial portion of their requirements in truckload quantities." It is

principally for this reason that you advised us the Commission does not consider it appropriate to expend its "limited funds" and "manpower" to undertake any investigation of Universal-Rundle's competitors. In short, the Commission's position is that Universal-Rundle, a manufacturer whose sale of "U–R" fixtures is but approximately 5% of the total sales of plumbing fixtures in the industry, a company which has incurred substantial operating losses during the past three years, is the *sole* plumbing fixture manufacturer distributing fixtures to some buyers who were incapable of buying their fixtures in truckload quantities. This apparently means the Commission will ignore the substantial price discriminations between truckload and less than truckload quantities charged by Universal-Rundle's competitors because of the above-quoted "understanding" about the capability of U–R competitor's customers to buy in truckloads.

Your "understanding" is not only *not* substantiated by the record in Docket 8070 but, in our opinion, is flatly contradicted by the evidence therein.

We invite your attention to the testimony of a regional sales manager of a competitor of Universal-Rundle (Tr. 1623). In this testimony the names of at least ten customers of another plumbing fixture manufacturer in the Philadelphia and Camden areas, were given. Two of these customers, Hajoca Corporation and Camden Plumbing, both located in Camden, N.J., also bought plumbing fixtures from Universal-Rundle Corporation. Neither Camden Plumbing nor Hajoca bought truckload quantities from Universal-Rundle. Both Hajoca and Camden Plumbing were among the customers of our client the Commission deemed "incapable" of buying in such truckload quantities.

At lease [*sic*] three other Universal-Rundle cus-

tomers, Freidman, Black & Brown, and Richmond Plumbing, all located in Philadelphia, did not, or according to the Commission's findings, could not buy in truckloads. Each of these three customers purchased plumbing fixtures from one or more of our client's competitors (Tr. pp. 514, 1099, 1063, 1100). If these customers of Universal-Rundle, namely, Camden, Hajoca, Black & Brown, Freidman, and Richmond Plumbing, were incapable, or economically precluded from buying in truckloads from our client, as you successfully convinced the Commission, we are at a complete loss to understand how this economic bar does not likewise apply to their ability to purchase truckload quantities from their other suppliers of plumbing fixtures, particularly since the Commission found that as to each of these customers, Universal-Rundle was the principal source for plumbing fixtures.

While it might be considered presumptuous on our part to suggest the most expeditious manner, and least expensive—both in funds and manpower—through which the Commission could act on our client's complaint, we are however mindful of the fact the Commission took four years to investigate Universal-Rundle, although initially the investigation was entirely unrelated to the matter of truckload discounts.

To avoid such a protracted investigation of Universal-Rundle's competitors, the Commission might find that most of the information it believed was necessary to constitute a prima facie violation by U–R's competitors (see Commission opinion of August 10, 1964) could be quickly obtained through issuance of Commission orders for special reports from each of the six plumbing fixture manufacturers. For example,

these reports could require production of the following information:

(a) The names, and location of all purchasers during the year 1964 in a representative number of trading areas. (The Commission sought such information for at least 10 trading areas during its proceeding involving Universal-Rundle. A similar number might suffice here, including each trading area within which the manufacturer has a plant or warehouse. See Tr. p. 1623 in D-8070, competitor of Universal-Rundle maintained a warehouse in Philadelphia and sold to Hajoca and Camden Plumbing, both non-truckload buyers of Universal-Rundle).

(b) All price lists in effect during the year 1964.

(c) Copies of all 1964 invoices to each customer included in (a) above.

(d) The minimum qualifications, both in units and weight for a buyer to obtain a truckload discount, and

(e) The functional level or levels at which the customer in (a) above resold or distributed each manufacturer's plumbing fixtures.

It is therefore urgently requested that your Bureau reconsider its refusal to undertake an investigation of the industry-wide practice of granting truckload discounts, and institute immediate action so as to minimize the impact a final Commission order would have upon Universal-Rundle Corporation.

Very truly yours,

FRANK C. MCALEER,
(For Kahn, Adsit & Arnstein).

JANUARY 11, 1965.

Re Corresp. File No. 7493.
FRANK C. MCALEER, Esquire,
Kahn, Adsit & Arnstein,
120 South LaSalle Street,
Chicago, Illinois 60603.

DEAR MR. MCALEER: This will acknowledge receipt of your letter of January 4, 1965, in which you renewed your request that a rather comprehensive investigation be conducted of the pricing practices in ten market areas of six of the largest manufacturers of plumbing fixtures.

I am confident that you realize that the conduct of such an investigation, by whatever investigational methods, will entail a most substantial expenditure of funds and manpower, and I am equally certain that you appreciate our reluctance to undertake such an expenditure in the absence of some reliable indication that violations of statutes administered by the Commission would probably be disclosed by such investigational effort.

As I understand Section 2(a) of the amended Clayton Act and the Commission's opinion in Docket No. 8070, the truckload discounts involved in Docket No. 8070 were not unlawful *solely* because some purchasers were incapable of buying in such quantities, but rather because the actual effect of such discounts was to confer lower prices upon some purchasers than upon competitors. As I said in my letter of December 2, 1964:

> If your client possesses any more concrete information indicating that any manufacturer *is* in fact selling plumbing fixtures at truckload discounts to some customers while other competing customers are economically precluded from buying in such quantities, you are invited

to submit such information, and we shall gladly consider this matter further * * *. [Emphasis supplied.]

We are reluctant to initiate an investigation at this time in reliance upon the evidentiary findings in Docket No. 8070 mentioned in your letter because those findings involve facts which were true eight years ago and which may now be different (for example, you are no doubt familiar with Mr. Backner's testimony in Docket No. 8070 that one of the "disfavored" purchasers was subsequently cut off by your client).

If your client has any information indicating that other manufacturers of plumbing fixtures are now selling fixtures to competing purchasers, or even to purchasers located in the same area, at different prices, whether by the operation of truckload discounts or otherwise, you are invited to submit such information, and this matter will be reconsidered. In the absence of such information, it is at least difficult for us to understand the manner in which your client may be disadvantaged competitively by enforcement of the order in Docket No. 8070.

Very truly yours,

STANLEY M. LIPNICK.

JANUARY 25, 1965.

STANLEY N. [*sic*] LIPNICK, Esq.,
Trial Attorney, Bureau of Restraint of Trade,
Federal Trade Commission, Washington, D.C.

DEAR MR. LIPNICK: In your letter of January 11, 1965 replying to my letter of January 4, 1965, you have advised me that the Commission still will not undertake any investigation of the substantial discriminations in price granted by competitors of Universal-Rundle Corporation, notwithstanding the evidence in Docket 8070 concerning sales by competitors of Universal-Rundle Corporation to customers the Commission found were unable to purchase in truckload quantities. You would disregard this evidence in Docket 8070 concerning the ability of certain customers to buy in truckloads from Universal-Rundle's competitors on the grounds that such facts may not be "true" at the present time, specifically citing testimony of Mr. Backner.

It now appears that your understanding about the type of accounts to which plumbing fixture manufacturers direct their sales efforts, i.e., "those capable of purchasing substantial portions in truckload quantities," and your refusal to start any industrywide investigation is based *solely* upon the testimony of Mr. Backner in Docket 8070. The testimony of Mr. Backner upon which you rely was to the effect that certain of his company's customers whom the Commission found to be "disfavored purchasers" were cut off by Universal-Rundle subsequent to 1957.

In my opinion, the cited testimony of Mr. Backner does not in any way establish that any of the five "disfavored" customers referred to in my letter of January 4, 1965 has not continued to purchase from Universal-Rundle's competitors in less than truckload quantities; rather, this testimony only establishes

there was no necessity for entrance of an order against our client, particularly one nationwide in scope, since Universal-Rundle and, insofar as the record is concerned, only Universal-Rundle had terminated certain "disfavored" customers.

I invite your attention to the exhibits which were attached to our petition for stay of the Commission's order. These exhibits included current price lists of Universal-Rundle's six principal competitors. These price lists show that each manufacturer has a freight allowance policy whereby freight at the truckload rate is allowed on all purchases in excess of 200 pounds.

In your answering brief in Docket 8070 you argued, in justification of a broad nationwide order, that the identical freight allowance policy of our client supported your contention that a customer would not normally buy in truckloads (Appeal Brief, p. 35) and that our client's freight policy was put into effect in anticipation of "substantial business nationally" in less than truckload quantities (A.B., p. 36). Would not the same argument be logically applied to each of Universal-Rundle's competitors employing, *at the present time, the identical freight policy?*

You also argued (A.B., p. 36) "* * * respondent's practice of granting special discounts for purchases in truckload quantities seems geared to substantial purchases in less than truckload quantities on a nationwide basis"—and to support this argument you gave the following reasons:

> "Respondent's basic price books in effect nationally, contain no mention of truckload discounts" (the same is true of each of the price books of Universal-Rundle's competitors—see Exs. AA, BB, CC, DD, EE, and FF to our Petition for Stay), and

"The only price announcement circulated generally * * * limits the special prices to truckload quantities." (This is similarly true of the competitors' special truckload prices—see Exs. A, B, C, D, E, and F to Petition).

With the arguments briefly summarized above, you convinced the Federal Trade Commission that Universal-Rundle's truckload and less than truckload pricing practices were existent nationwide and that Universal-Rundle was in fact discriminating in price in all sections of the country through its truckload discounts. I am unable to understand how you could so argue before the Commission and vigorously contend that a broad nationwide order be entered against my client because of its freight policy and manner of publishing its truckload discounts, yet within a few months after issuance of this nationwide order, you now take the position that the identical freight policy and manner of communicating their differential pricing by our client's competitors, is not a sufficient basis to cause the Commission to undertake even an investigation of these competitors.

If, of course, you are still of the view that Mr. Backner's testimony with regard to the type of accounts *our client selects* obviates the necessity of any investigation of Universal-Rundle's competitors, this conviction, in all fairness, would require a filing of a motion by your Bureau with the Commission to rescind the Commission's order in Docket 8070. If upon reflection you now believe that the freight policy and methods of price announcements employed by Universal-Rundle Corporation's competitors are not "geared to substantial purchases in less than truckload quantities on a nationwide basis", i.e., not enough even to prompt an investigation, it would be in the public interest for counsel to file a joint motion with

the Commission requesting specific geographic limitations of the Commission's order in Docket 8070.

I would appreciate an early reply to this letter. Neither the appendix nor briefs have been filed in the petition for review in Docket 8070. In the event you indicate your Bureau would agree to modification or withdrawal of the order, it might obviate further expense to our client and conserve both the Commission's manpower and funds, because under such circumstances we would probably consider it feasible to withdraw our appeal.

Very truly yours,

FRANK C. MCALEER.

FEBRUARY 5, 1965.

Re Corresp. File No. 7493.

FRANK C. MCALEER, Esquire,
Kahn, Adsit, Arnstein, Gluck, Wietzenfeld & Minow,
120 South LaSalle Street, Chicago, Illinois 60603.

DEAR MR. MCALEER: This is in reply to your letter of January 25, 1965.

Initially, this Bureau will not consent voluntarily to a withdrawal of the order entered by the Commission in Docket No. 8070, nor to the limitations suggested in your letter. Secondly, your comments regarding the apparent basis of our understanding of manufacturers' present principal sales efforts does not appear to me to reflect a fair reading of my letter of January 11.

Despite your claim that our refusal to undertake a costly and sweeping investigation of a large number of major manufacturers is based *"solely"* upon Mr. Backner's testimony in Docket No. 8070, the fact is, as you have consistently been informed, that our reluctance is based upon your complete failure to submit any information indicating that a reasonable probability exists that competitors' discount schedules are now discriminatory in their operation (*i.e.*, confer truckload discounts upon some purchasers who in fact compete with other purchasers lacking the capacity to buy any portion of their requirements in truckload quantities). Perhaps it would be well to summarize briefly the kind of information we have in mind as well as our reasons for thinking that such information is now in the possession of your client if your client's competitors are in fact engaging in the type of violations which you requested us to investigate.

It is our understanding that your client has a sales force engaged in the nationwide marketing of plumb-

ing fixtures produced by your client. It is our further understanding that your client's products (other than those sold to Sears) are marketed by your client principally or exclusively to jobbers handling plumbing fixtures. We assume that such a sales force, in the normal performance of its duties, would acquire substantial knowledge of the general market in which its products are sold, including the identity of jobbers selling competitive products. We further assume that such general market knowledge would encompass at least some notion of whether particular jobbers handling competitive products enjoy or do not enjoy sales volumes capable of supporting purchases of plumbing fixtures in truckload quantities.

If your client has any such information indicating that any competitor is selling plumbing fixtures to jobbers in any trading area, some of whom are capable of buying in truckload quantities while others are not, you are invited to submit such information, and your request that an investigation be conducted will be reconsidered. If your client does not have information regarding the ability of jobbers of competitive fixtures to purchase in truckload quantities, your request that an investigation be conducted will be reconsidered nonetheless if you inform us of the trading areas in which any of your client's competitors regularly sell fixtures to five or more jobbers. If your client does not possess even that information, kindly so advise us, and your request that an investigation be conducted will be reconsidered in light of such advice.

In any event, we firmly adhere to our previously announced positions regarding what is and what is not established by the evidence of record in Docket No. 8070, and there does not seem to be much point in further engagement in debating issues which were

raised and decided in Docket No. 8070 and which were at least raised before the Commission by your petition for a stay of the order. I should remind you, in this regard, that the Backner testimony regarding discontinuance of sales to four of the five jobbers referred to in your letter is not in the record of Docket No. 8070, having been ordered stricken by the hearing examiner and no appeal from such ruling having been made to the Commission.

I trust that this letter will explain our position to you with clarity. If you see fit to submit any or all of the information or advice mentioned above, we shall reconsider your request that your client's competitors be investigated.

Very truly yours,

STANLEY M. LIPNICK.

MARCH 4, 1965.

Re FTC Correspondence File No. 7493.

STANLEY M. LIPNICK, Esq.,
Division of Discriminatory Practices, Bureau of Restraint of Trade, Federal Trade Commission, Washington, D.C.

DEAR MR. LIPNICK: In your letter of February 5, 1965 in the above matter, you notified us that the Commission would reconsider its refusal to institute an investigation of the pricing practices of plumbing fixture manufacturers in selling truckload quantities of fixtures at lower prices than fixtures sold in less than truckload quantities. Such reconsideration would be given if our client, Universal-Rundle Corporation, furnished the names of at least five customers in the same trading area regularly purchasing fixtures from any competitors of Universal-Rundle.

Enclosed as Exhibit A to this letter is a list of American Standard's customers in 13 trading areas of the country. Exhibit B is a list of Kohler customers in 11 trading areas. We are advised by our client that the customers listed in Exhibits A and B regularly purchase fixtures from the indicated manufacturer.[2]

You will note that American Standard sells fixtures to independent customers, and in some of the trading areas also sells through "Amstan". The latter is a division of American Standard, distributing fixtures to plumbers, builders, and to a certain extent wholesalers. We have been advised by our client that in the past prices charged by the Amstan Division in selling to its customers have been lower than prices charged for the same fixtures sold by American Standard to wholesalers whose customers compete

[2] For purposes of economy, we are not reprinting the exhibits attached to this letter.

with accounts buying from Amstan. Any investigation of American Standard's pricing practices should, therefore, include the prices paid by Amstan's customers, as well as the independent customers buying from American Standard.

We would appreciate your notifying us whether, on the basis of the information submitted herewith, when considered with the matters discussed in our previous correspondence, the Commission will now institute an investigation and act upon our previous complaints.

Very truly yours,

FRANK C. MCALEER.

Encls.

MARCH 12, 1965.

Re Corresp. File No. 7493.

FRANK C. MCALEER, Esquire,
Kahn, Adsit, Arnstein, Cluck, Weitzenfeld & Minow,
120 South LaSalle Street, Chicago, Illinois 60603.

DEAR MR. MCALEER: I have received your letter of March 4, 1965, which relates to previous correspondence between us. I shall reply in further detail as soon as I have had an opportunity to study your letter and to secure whatever approval may be required for my recommendations. In the meantime, it would be of considerable assistance to us (and would contribute substantially to any investigation which we do undertake) if you would advise me of the reasons, if any, which your client has for believing that some of the accounts listed in the exhibits to your letter buy fixtures from American Standard or Kohler in truckload quantities, and of your client's reasons, if any, for believing that some of those accounts do not buy any fixtures from either manufacturer in truckload quantities. If your client has no idea of the quantities in which the listed accounts buy, please advise me to that effect.

Very truly yours,

STANLEY M. LIPNICK,
Attorney.

APRIL 19, 1965.

Re Corresp. File No. 7493.

FRANK C. MCALEER, Esquire,
Kahn, Adsit, Arnstein, Gluck, Weitzenfeld & Minow,
120 South LaSalle Street, Chicago, Illinois 60603.

DEAR MR. MCALEER: This is in further reply to your letter of March 4, 1965, in which you reiterated your request that the Commission conduct an investigation of the pricing practices of American Radiator & Standard Sanitary Corporation and The Kohler Company. Through our established liaison with the Antitrust Division, Department of Justice, we have been advised that such an investigation would conflict with an investigation now being conducted by the Antitrust Division. Accordingly, initiation of the action you requested does not seem appropriate at this time.

* * * [W]e are already investigating alleged violations of Sections 2(d), and 3 of the Clayton Act, as amended, and of Section 5 of the Federal Trade Commission Act by [another plumbing manufacturer]. If that company is in fact discriminating in price among competing customers, there would seem to be a substantial possibility that such fact will be disclosed during the course of the pending investigations.

Very truly yours,

STANLEY M. LIPNICK.

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No. 101

In the
Supreme Court of the United States

OCTOBER TERM, 1966.

FEDERAL TRADE COMMISSION,
Petitioner,

vs.

UNIVERSAL-RUNDLE CORPORATION,
Respondent.

BRIEF FOR RESPONDENT

FRANK C. MCALEER
JAMES R. FRUCHTERMAN
120 South LaSalle Street
Chicago, Illinois 60603
Attorneys for Respondent

ARNSTEIN, GLUCK, WEITZENFELD & MINOW
120 South LaSalle Street
Chicago, Illinois 60603
Of Counsel

The Scheffer Press, Inc.—ANdover 3-6850

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

No. 101

FEDERAL TRADE COMMISSION,

Petitioner,

vs.

UNIVERSAL-RUNDLE CORPORATION,

Respondent.

BRIEF FOR RESPONDENT

STATEMENT

The Federal Trade Commission, on June 12, 1964, found that Universal-Rundle Corporation had violated Section 2(a) of the amended Clayton Act, 15 USC 13(a), by granting an average truckload discount of 10% from its published wholesaler net prices on the sale of certain items of its "U-R" brand plumbing fixtures.[1] A cease and desist order, nationwide in scope, was entered prohibiting any price discrimination between competing purchasers of "U-R" fixtures.

---

[1] The Commission dismissed the charges pertaining to the sale of fixtures to Sears, Roebuck and Co., finding such fixtures were not of like grade and quality as the "U-R" brand fixtures. (R. 30-34)

The FTC's finding of violation was limited to a showing that in 1957 respondent had three customers in the Philadelphia and Camden trading areas who, on seven occasions, bought in truckload quantities and received truckload discounts, while there were seven other "competing" customers who purchased fixtures in less than truckload quantities and paid higher wholesaler net prices. According to the Commission, truckload quantities were beyond the buying capabilities of these seven customers, (R. 34-45). Five of these seven customers also purchased plumbing fixtures from one or more of respondent's competitors. (R. 250; 384; 408; 480-482) During trial of this case before the Hearing Examiner the names of 13 customers of one competitor (R. 480) and 10 of another competitor (R. 482) located in the Philadelphia and Camden areas were identified.

On July 20, 1964 respondent asked the Commission to stay the effective date of its cease and desist order for at least 18 months and in that interval for the Commission to investigate and take whatever action it deemed appropriate with regard to respondent's six major competitors who were also engaging in the practice of granting truckload discounts. In support of its petition for such a stay respondent made the following showing:

1. The plumbing fixture industry is highly concentrated. Four of respondent's competitors as a group accounted for 66% of the total industry sales. The leading manufacturer's share was 32%, while respondent's market share, as affected by the order, 5.75%, was one of the smallest in the industry. (R. 50)

2. Each of the respondent's six major competitors offered truckload discounts which averaged approximately 18% below their published wholesaler's net price for

identical fixtures purchased in less than truckload quantities. (R. 493-499)

3. Respondent demonstrated the severe financial losses incurred in the operation of its business in the three years immediately preceding entry of the cease and desist order, as contrasted to the showing of substantial profits by each of the six competitors. (R. 52; 500-518)

4. Respondent, through the affidavit of its Vice President in Charge of Sales, informed the FTC of the following: (a) Each of the six competitors distributed plumbing fixtures in the larger trading areas of the country in the same manner in which respondent sold its products; (b) some of its competitors were granting truckload discounts in certain areas of the country on all their plumbing fixtures at 15% to 20% below the price for less than truckload quantities; and (c) based upon his knowledge of the plumbing fixture industry, should the FTC refuse to stay the order, pending some corrective action by the Commission concerning the competitors' truckload discount practices, respondent's market share would be substantially decreased and the company would incur further financial losses. (R. 54-55)

In its petition for a stay, respondent did not ask the Commission to postpone entry of the cease and desist order until its competitors were placed under similar orders; nor did respondent request that enforcement of the order against it be made contingent upon the FTC filing complaints or obtaining cease and desist orders against respondent's competitors. So confident was respondent that the FTC would treat it in a fair and equitable manner and follow its announced policy of correcting industry-wide practices on an industry-wide basis, that respondent agreed to waive its statutory right to judicial

review if the requested relief were to be granted. (R. 46-47)

The FTC on August 4, 1964, declined to grant the requested relief on the ground that respondent's showing was insufficient to warrant the Commission's taking any action. In denying the stay, the Commission made no finding that there might possibly be an adverse effect upon competition in the secondary line should the effective date of the cease and desist order be postponed, which would outweigh respondent's predicted competitive impairment in the primary line. In its order denying respondent's request, the FTC simply took the position that before it would be justified in commencing an investigation of respondent's competitors, it would be necessary for respondent to submit to it evidence probative of every element of a *prima facie* case and, in addition, the FTC indicated a need for evidence tending to negate the existence of possible affirmative defenses. (R. 62-67)

Nor did the FTC in refusing to investigate respondent's competitors indicate that it had considered the possible impact on the secondary level of competition, which might result from these competitors truckload price discriminations, which, as previously shown, averaged approximately 18%, even though the Commission had found in the present case that price competition in the distribution of plumbing fixtures was "extremely keen" (R. 40), and differentials averaging approximately 10% were sufficient to bring about the effect proscribed by statute. (R. 44)

After entry of the FTC's order of August 4, 1964, respondent continued its efforts through a series of correspondence with the staff of the Commission to have some action taken to correct this industry-wide practice.

(FTC Br., Appendix C, pp. 35-54) On March 4, 1964 respondent furnished the Commission names of customers located in several trading areas of the country of the two largest producers in the industry. (FTC Br., Appendix C, pp. 52-53)

By letter dated April 19, 1965 the Commission's staff notified respondent's counsel that any investigation of Section 2(a) violations by respondent's competitors would conflict with a pending investigation by the Department of Justice and, therefore, the Commission would not then (April 1965) investigate. (FTC Br., Appendix C, p. 55)[2]

The FTC admitted in its brief in the Court of Appeals that "specific information" had been furnished "tending to show current violation of Section 2(a) by two of [respondent's] competitors. . . ." (R. 574). But the FTC informed the court it would not investigate because of a possible conflict with the Department of Justice.

In reviewing the Commission's refusal to stay the effective date of its cease and desist order and the Commission's refusal to take any action with regard to respondent's competitors, the Court of Appeals ruled that respondent had made a "strong showing" that its competitors were currently engaging in the same practice as

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[2] The FTC's letter of April 19, 1965 was received by respondent's counsel after the staff of the FTC had been advised that certain correspondence between counsel (letters dated November 16, 1964 and December 2, 1964, FTC Br., App. C, p. 35-38) had been referred to in respondent's brief in the lower court. Since respondent's brief had already been sent to the printer when the FTC's letter of April was received, an addendum summarizing the letter and the circumstances surrounding its receipt was filed in the Court of Appeals. This addendum is set forth as Appendix C to this brief.

was found to be illegal when done by respondent. The Court of Appeals ruled that under these circumstances the Commission's flat refusal to take any action concerning respondent's competitors, who were granting greater discounts, was a patent abuse of its administrative discretion because such a refusal was inconsistent with the overriding policy of the Clayton Act, stating:

> "We are not convinced that the Clayton Act requires us to approve the imposition of sanctions upon only one of the smallest of a group of law violators. If we did, the giants in the field would be the real benefactors—not the public." (R. 573)

The Court of Appeals further ruled that respondent's showing was sufficient to place upon the Commission a duty to investigate and that it could not condone the Commission's refusal to perform that duty. It also ruled that the pendency of a Department of Justice proceeding did not serve to excuse the Commission's refusal to investigate. (R. 574-575)

The Seventh Circuit reserved its ruling on the merits of the case and remanded this proceeding to the Commission with instructions to grant the alternative relief requested by respondent, that is, the staying of the effective date of the cease and desist order pending investigation by the Commission of respondent's competitors.

SUMMARY OF ARGUMENT

1. The Commission acted arbitrarily and abused its discretion in denying the requested stay and in refusing to investigate respondent's competitors for each of the following reasons:

A. It is an abuse of administrative discretion for an agency to take action which is inconsistent with the Congressional policy sought to be attained by the legislation entrusted to the agency for enforcement.

The Court of Appeals ruled that the FTC's action was contrary to the underlying purposes of the Clayton Act in that the FTC's decision to ignore respondent's larger competitors would benefit, not the public, but the "giants in the field." Such action if not subject to a judicial review would thwart the Congressional purpose of protecting, rather than impairing small corporations, such as respondent, at the seller level of competition.

The Court did not substitute its views on this issue for those of the Commission, since the Commission itself gave no consideration to the possible impact of its order at the seller level, nor did the Commission consider the probable result of its action at the secondary level of competition, especially among those buyers handling plumbing fixtures of respondent's competitors.

It was therefore proper for the Court to remand this cause to the Commission in a situation where, in the absence of a contrary determination, or any determination by the agency on this question, the Court perceived that the result of the agency's action would be inconsistent with the statutory purpose.

B. The FTC's action in denying the requested stay was an abuse of discretion because the flat refusal to investigate respondent's competitors precluded the Commission from obtaining essential information prerequisite to the proper exercise of its administrative discretion.

This Court in *Moog Industries, Inc.* v. *FTC,* 355 U.S. 411 (1958), clearly stated that in circumstances such as those presented in the instant case the FTC has a duty to investigate and find out whether an allegedly illegal practice is industry-wide in scope, before deciding whether to proceed by bringing individual cases or by bringing industry-wide proceedings. In this case, the FTC refused to undertake this duty, thus precluding itself from making a knowledgeable determination as to whether the order against respondent should have been enforced immediately or stayed.

An administrative agency abuses its discretion when it attempts to exercise that discretion without knowledge of essential facts.

C. The Commission's refusal to grant the requested stay was an abuse of discretion because that refusal was arbitrary when judged in the light of the Commission's own announced standards.

The Commission in its official policy statements to the Congress has stated that whenever a law violation is identified, the Commission, instead of applying the simple method of halting an individual violator, undertakes to find out if the violator's competitors are doing likewise. The FTC's policy pronouncements and its action denying the stay and refusing to investigate this respondent's competitors are simply irreconcilable.

The Court of Appeals decision merely calls upon the FTC to apply that same policy which the FTC has al-

ready been consistently following in a case where no reason was present which indicated that an exception to that policy was required. The FTC's deviation from its announced policy and consistently applied method of procedure was arbitrary and unfair.

2. There is no conflict between the Court of Appeals decision in this case and this Court's prior decision in Moog Industries, Inc. v. FTC.

In *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411 (1958), there was no claim that the Commission had refused to investigate those respondent's competitors. On the contrary, the auto parts industry, in which those respondents competed, had already been subjected to an industry-wide FTC investigation and numerous complaints as well as cease and desist orders had been already issued.

In contrast, although a decade has elapsed since the onset of the alleged discriminations in the plumbing fixtures industry, the Commission has acknowledged that it has not commenced a single investigation save for that of this respondent.

This case, unlike *Moog* does not involve an attempt by the court below to supervise the FTC's timetable of enforcement, but rather involves the propriety of the Commission's determination to proceed against a single respondent and ignore all the remaining competitors in the industry, despite a strong showing that the remaining competitors were engaging in the same practice alleged to be illegal.

3. The court below did not err by reserving its judgment on the validity of the cease and desist order.

The FTC's argument that the court below erred by failing to first pass on the validity of the cease and desist order before ruling on the Commission's action denying the stay, is premised upon what equates to a claim, that the FTC is entitled to a test case before an industry-wide investigation would be appropriate.

This is flatly contrary to the FTC's consistently employed approach used in enforcing the price discrimination law in other industries. Moreover, it is diametrically opposed to the official policy pronouncements of the Commission and the statements of its Chairman and other present members of the FTC, which decry such a tactic as unfair.

Finally, the Commission does not in its brief demonstrate one unique or even unusual legal theory or evidentiary problem which would justify the claimed need for a test case in the industry here involved.

4. The claim that the FTC is now powerless to investigate respondent's competitors because of pending Department of Justice proceedings under the Sherman Act is wholly lacking in merit.

The FTC's grounds for refusing to investigate respondent's competitors were limited to a claimed insufficiency of the showing made by respondent that its competitors might be violating Section 2(a) of the amended Clayton Act. By the time this case reached the Court of Appeals the FTC was forced to acknowledge that the cited grounds were no longer valid with regard to at least two of respondent's largest competitors.

The FTC then sought to justify its continued refusal to investigate by claiming that such action on its part might conflict with an investigation then being conducted by the Department of Justice.

The claimed conflict supposedly is the problem which might arise should the FTC inadvertently confer immunity on individuals which the Department of Justice might desire to prosecute criminally for suspected violations of a different antitrust statute. The FTC's attempted justification by virtue of this extraneous circumstance is wholly without merit because the FTC has at least four investigative avenues available to obtain the necessary information, not a single one of which could possibly involve the least danger of conferring immunity on an individual.

The FTC itself must recognize the invalidity of this belatedly raised excuse, since it has advised respondent that investigations by it of another plumbing manufacturer under other sections of the amended Clayton Act are presently being undertaken.

ARGUMENT

1. The question which the Court must resolve is whether the FTC in connection with its order of August 4, 1964 denying respondent's petition for a stay of enforcement acted arbitrarily and abused its discretion.[1] This question must be answered in the affirmative for the three following reasons:

A. It is an abuse of administrative discretion for an agency to take action which is inconsistent with the Congressional policy sought to be attained by the legislation entrusted to the agency for enforcement.

In this case, the Seventh Circuit ruled:

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[1] Petitioner couches the question presented in terms of the court of appeals having exceeded its authority and usurped the Commission's function by making a discretionary determination which the law properly reserves to the Commission. It accuses the court below of undertaking ". . . for itself the Commision's task of finding economic facts and evaluating competing economic interests." (FTC Br., p. 8)

Respondent submits that the decision of the court below must be viewed in a fundamentally different light. The court's decision does not stand for or countenance the proposition that reviewing courts are free to substitute their own discretionary determinations in place of those arrived at by an administrative agency. This is not what the court did. What the court did was simply to remand a case back to the Commission so that it might properly exercise its administrative discretion in a situation where the court was convinced that the Commission had acted arbitrarily and abused its discretion in the first instance. To correct an arbitrary abuse of discretion on the part of an administrative agency is a proper function for a reviewing court and well within such court's authority. The prior decisions of this Court and the explicit provisions of the Administrative Procedure Act render this principle beyond dispute. Section 10(e), Administrative Procedure Act, 5 U.S.C. 1009(e); *Moog Industries Inc.* v. *F.T.C.*, 355 U.S. 411 (1958).

". . . We cannot, in the name of an antitrust prosecution, lend our support to the sacrifice of a comparatively small manufacturer when its larger and more guilty competitors are not prosecuted.

"We are not convinced that the Clayton Act requires us to approve the imposition of sanctions upon only one of the smallest of a group of law violators. If we did, the giants in the field would be the real benefactors—not the public." (7th Cir. Opin., R. 573)

In the above-quoted passage, which is the very heart of the court of appeals decision, the court expresses its inability to perceive in the Commission's action denying the requested stay, a plan of operation which even remotely resembles conformity with the basic purposes of the antitrust laws. The court makes it plain it believes just the opposite is true—the Commission's challenged action would frustrate rather than further the objectives of those statutes.

It is well settled that it is a patent abuse of administrative discretion for an agency to make a decision which is inconsistent with the over-riding legislative purpose sought to be attained by the enactment of the statute whose enforcement Congress has entrusted to the agency. In *N.L.R.B.* v. *Brown,* 380 U.S. 278 (1965) this Court ruled:

"Reviewing courts are not obligated to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the Congressional policy underlying a statute. Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions." (380 U.S. 278, 291-292)

In the same vein this Court has pointed out that the permissible latitude for the exercise of discretion by an administrative agency is not so unlimited so as to permit an agency to "lose sight of the law." *General Protective Committee, Etc.* v. *SEC*, 346 U.S. 521, 536 (1954). This Court has also ruled that agency actions which do not conform to the overriding standard laid down by Congress for the agency involved are not legitimate exercises of administrative discretion. *Burlington Truck Lines* v. *U.S.*, 371 U.S. 156 at 167 (1962).

The case at bar was brought by the Federal Trade Commission under the anti-discrimination provisions of the amended Clayton Act. It cannot be disputed that Congress did not pass the Clayton Act for the purpose of conferring advantage on the "giants in the field". On the contrary, it has long been recognized that the overriding statutory purpose sought to be attained by that enactment was two-fold. One goal was to protect the small merchant from the competitive disadvantage of having to pay higher prices than his more financially powerful competitors, primarily the large chain store operations, *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948); a second goal was to protect competition at the seller level where Congress feared that the competitive opportunities of smaller manufacturers might be endangered by the ability of larger corporations to use economic leverage through discrimination to impair them competitively. *FTC* v. *Anheuser-Busch, Inc.*, 363 U.S. 536 (1960).

These twin objectives have one common denominator, the desire to protect the smaller competitor, whether at the buyer or seller level, from his financially more powerful competitors. The underlying premise from which this legislation springs is the Congressional belief that the

public interest will best be served by preserving a multiplicity of competitors, large and small, at all levels of competition, and that the elimination or impairment of the smaller members of the competitive array would be detrimental to the public interest. This Court has instructed reviewing courts to bear these basic underlying legislative goals in mind when rendering decisions in the antitrust field. *United States* v. *Pabst Brewing Co.*, 384 U.S. 546, 16 L. Ed. 2d 765 (1966).

Here, the Court of Appeals has held that when the Federal Trade Commission entered its order of August 1964, by which it not only refused to stay the cease and desist order, but also flatly refused to investigate respondent's competitors, that agency simply chose to ignore the statutory purpose of protecting, rather than impairing the competitive opportunities of respondent, a small competitor at the seller level of competition.

Now, in its brief before this Court, petitioner claims the court below usurped the Commission's function and made a determination which the law properly reserves to the Commission's administrative discretion by considering the detrimental effect which immediate enforcement might have at the seller level. It accuses the court of appeals of making an evaluation of "competing economic interests", a phrase which, although unexplained in the FTC's brief, obviously has reference to an analysis of the probable impact at the seller, as opposed to buyer, level of competition which might flow from enforcement of the order. (FTC Br., p. 8)

What is overlooked in the FTC's brief is that when it claims the court below erred by "undertaking for itself" this evaluation of "competing economic interests", petitioner is in effect defining the duties which were properly

encumbent upon the Commission in the situation under review.

But where is the Commission's evaluation of competing economic interests in place of which the court wrongfully substituted its own determination? Where in its order denying the stay does the FTC determine that adverse effects deemed probable at the buyer level of competition between respondent's customers outweigh any possible competitive impairment of respondent at its own seller level of competition? The answer is, the Commission did not even consider the problem. The sole grounds which the Federal Trade Commission advanced in support of its order denying the stay was that it did not feel inclined to expend its resources in investigating respondent's competitors, because respondent had not supplied it with every element of a *prima facie* case. No weighing of economic interests appears in the Commission's order, the Commission simply failed to consider how enforcement of its order against respondent might contribute to an increase in the already high degree of concentration in this industry. (R. 62-3).

Respondent agrees that if the Commission had actually made the evaluation now described in the FTC's brief, that is to say, if the Commission had ascertained the essential facts, analyzed those facts, and then determined that the cease and desist order should not be stayed because any possible competitive impairment to respondent occasioned thereby would be outweighed by the adverse effects reasonably predictable in the secondary line if enforcement of the cease and desist order were to be delayed, then the Commission would have performed its administrative function in deciding the most appropriate method of carrying out its statutory responsibilities.

But, how can the FTC properly criticize the court of appeals for *"substituting"* its own discretionary determination for that of the Commission when the Commission itself never considered the problem?

Of even more significance is the total failure of the FTC's brief to do more than *merely suggest* to this Court that there might be serious consequences among respondent's customers resulting from staying the cease and desist order. Why this should be so is never explained.[2] Yet, this suggested detrimental effect, even though not referred to by the Commission in its order of August 1964 and not explained even in the FTC's brief to this Court, is supposedly sufficient to render the court of appeals' decision herein erroneous. The FTC is hardly in a position where it can afford to cast a spotlight on

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[2] Respondent has only a minor share of the plumbing fixture market. (R. 572) If it were to cease granting truckload discounts this would hardly alleviate the necessity of its smaller customers still being required to compete with the customers of other plumbing fixture manufacturers still granting such allowances. If, on the other hand, respondent were to effect compliance by following the course which the FTC brief describes as preferred (FTC Br. p. 24) and cease selling to its smaller non-truckload buying customers, it is indeed difficult to perceive how this would benefit those smaller customers.

The terminated customers would have but two practical alternatives. They could discontinue reselling plumbing fixtures, which is highly unlikely, or they could buy such products from another discriminating manufacturer and pay the discriminatory higher non-truckload price to a competitor of respondent. Under these conditions, how would enforcement of this order against respondent benefit the small non-truckload buyers?

Conversely, at the seller level, regardless of which course respondent elects it will lose customers to those competitors continuing to grant truckload discounts.

any possible adverse effects on competition at the secondary level. After all, in refusing to investigate respondent's competitors, the FTC displayed not one whit of solicitude for the customers of the remaining manufacturers of plumbing fixtures who were paying, not the 10% differential for which the FTC condemned this respondent, but differentials "far in excess" thereof. (R. 572)

Respondent submits that where it is clear to a reviewing court, that as a result of an administrative agency's action an effect, not only unintended by the statute, but definitely contrary to the purpose of the statute, will be brought about, and where, as here, no countervailing salutory effect is apparent from the agency's action, the reviewing court must act to correct the situation.

B. The FTC's action in denying the requested stay was an abuse of discretion because the flat refusal to investigate respondent's competitors precluded the Commission from obtaining essential information prerequisite to the proper exercise of its administrative discretion.

In the case of *Moog Industries, Inc.* v. *F.T.C.*, 355 U.S. 411 (1958), this Court, in considering whether the FTC's cease and desist order at issue in that case should have been stayed pending the prosecution of that respondent's competitors, ruled:

> "Moreover, although an allegedly illegal practice may appear to be operative throughout an industry, *whether such appearances reflect fact* and whether all firms in the industry should be dealt with in a single proceeding or should receive individualized treatment *are questions that call for discriminatory determinations by the administrative agency.*" (355 U.S. 411, at 413, emphasis supplied)

This language clearly indicates this Court's view that in a situation such as that which was present when respon-

dent petitioned for a stay, the Commission has a *duty* to investigate and find out whether an allegedly illegal practice is in fact industry-wide in scope. No other interpretation can be applied to the Court's "whether appearances reflect fact" terminology.

In this case respondent went much further than merely making a naked accusation that its competitors were granting truckload discounts. It attached documentary proof in the form of bulletins and price lists issued by all its major competitors which showed that they were granting such discounts. The authenticity of these documents has never been challenged.[3]

Obviously, price lists and price bulletins do not in and of themselves prove that the manufacturers issuing them are violating the price discrimination law. Respondent has never contended to the contrary. But, certainly these documents, at the very least, did serve to create the "appearance" that the granting of truckload discounts, the practice which the Commission had challenged when done by respondent, was industry-wide. Faced with such a showing, the Commission made no attempt to ascertain *whether such appearance reflected fact,* instead it chose to do just the opposite and refused to take any action. It thus precluded itself from obtaining the very information

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[3] This documentary material has been reproduced in the printed record, R. 519-555. The only challenge now raised by the FTC is that respondent granted truckload discounts on its entire line, whereas its competitors restricted such discounts to a few items (FTC Br., pp. 3, 16-17). This claim finds no support in the record and is flatly contradicted thereby. If respondent's truckload discount bulletins are examined, it will be noted that respondent always limited the availability of these differentials to certain specific items (Respondent's Exhibits 16-28b, R. 452-453, R. 556-567), not its entire line.

which it would necessarily have to have in order to properly exercise its discretion in determining whether the most efficacious remedy consonant with the underlying purposes of the Clayton Act was to enforce the cease and desist order immediately or to grant the requested stay.

It is manifest that an administrative agency cannot legitimately exercise the discretion entrusted to it in ignorance. The whole concept of administrative discretion presupposes an expert body armed with knowledge of the facts. An administrative agency, therefore, abuses that discretion when it attempts to exercise it in the absence of knowledge of the facts.

Although respondent had quoted this Court's ruling in *Moog* delineating the Commission's duties in its answer to the petition for certiorari, the FTC's brief makes no direct reference to this portion of that decision. It is interesting to note, however, that instead of making a direct attempt to reconcile the Commission's refusal to investigate with the previously quoted portion of this Court's *Moog* holding, the FTC instead tries to rearrange the basic facts and argues that the Commission did not refuse to investigate these competitors at all, and that it actually did make such an investigation. In the Argument section of the FTC's brief, the following statement appears:

> ". . . , after examining respondent's petition and the affidavits *and general sources of information about the industry available to it (such as the file of complaints by members of the public)*, it was reasonable for the Commission to conclude that such investigation would not represent a profitable or useful expenditure of its limited investigative resources." (FTC Br. p. 21)

The italicized portion of the above quotation is clearly a statement of fact, but no citation to the record is made in support of it. Respondent would note, however, that in issuing its order rejecting respondent's request for a stay, the Commission made no reference to its having undertaken the steps which are in italics above, nor did it give any hint as to what, if any, information it gleaned as a result thereof, nor to what extent such information may have influenced its decision to deny the requested stay. (R. 62-63). Respondent concedes that the examination and consideration by the Commission of pertinent information, even though *de hors* the record, under the circumstances then present, would have been a proper undertaking for an enforcement agency and it makes no challenge to the propriety thereof. The law, however, is clear that in judging the propriety of an agency's actions, the courts must limit their review to the grounds stated by the agency for its acts. Thus, this Court in *Burlington Truck Lines* v. *U.S.*, 371 U.S. 156 (1962), stated:

> "The [reviewing] courts may not accept appellate counsel's post hoc rationalization for agency action; . . . [precedent] . . . requires that an agency's discretionary order be upheld if at all on the same basis articulated in the order by the agency itself: A simple but fundamental rule of agency law . . . is . . . that a review court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such actions solely by the grounds invoked by the agency. . . ." (371 U.S. 156, at 168)

This eleventh-hour reference to facts previously unmentioned as grounds demonstrating the "reasonableness" of the Commission's denial of the requested stay is not without significance, for certainly this demonstrates a doubt on the part of the FTC now as to the adequacy of

the reasons invoked by the Commission for its action of August 4, 1964.

It is clear, very clear, from the statement made by the Commission in rejecting the requested stay that the Commission had *not* investigated to determine whether petitioner's competitors were also violating the law, because the Commission unequivocally stated that it would not conduct such an investigation. (R. 62-63)

This late change of position is made for the obvious reason that FTC counsel now realize that if the Commission lifted not a finger in an effort to ascertain whether or not respondent's competitors were violating the law, then that agency's action could not be reconciled to this Court's mandate set forth in the above-quoted passage of the *Moog* decision. The FTC would then be left in a hopeless position to justify an attempted exercise of administrative discretion in a situation where it is clear that the Commission not only did not have, but also refused to obtain the necessary information upon which to base such a determination.

C. The Commission's refusal to grant the requested stay was an abuse of discretion because that refusal was arbitrary when judged in the light of the Commission's own announced standards.

The Commission in its official policy statement contained on the first page of its annual report to the Congress for the year 1964, the year in which the complained of action took place, made the following declaration:

> "Unprecedented emphasis on the use of industry guidance methods as alternatives, whenever possible, to formal adversary actions characterized the work of the Federal Trade Commission during fiscal 1964.

In pursuing this policy, the Commission moved toward its original purpose of guiding business into legal channels without bringing down upon it the 'menace of the law'.

• • •

"*Whenever a law violation was identified, the Commission, instead of applying the simple (and superficially vigorous) method of halting individual violators, undertook to find out if their competitors were doing likewise.* If they were, the Commission then decided how best this competitively generated evil could be eliminated with the least delay." (Annual Report of The Federal Trade Commission (1964), p. 1, emphasis supplied.)

This Commission policy pronouncement and the Commission's action denying the stay are simply irreconcilible.[4] Here the Commission tells Congress that in every instance when it identifies a law violation it makes an effort to determine whether the violation is prevalent throughout the industry. According to the Commission, it undertakes this task in all cases as part of its normal operating procedure, not just those where a respondent petitions it to do so. The Commission has offered no explanation as to why this procedure was not followed in this case. The arbitrariness of the Commission's departure from this general standard is further aggravated by the circumstance that respondent had requested that the announced procedure be followed, and had produced evidence showing the challenged practice was widespread.

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[4] For a detailed comment approving the lower court's decision in this case wherein the author stresses this irreconcilibility between the Commission's announced policy and its action of August 4, 1964; see: Agency Enforcement Discretion, 41 N.Y.U.L. Rev. 964, at 966 (1966).

The very epitome of arbitrary governmental action is to depart from an announced general standard or procedure in a particular case in the absence of some good and sufficient reason indicating that an exception should be made. Justice, whether it is dispensed by a court or by a quasi-judicial body such as the Federal Trade Commission, should be done in an even-handed manner. In the case at bar no sufficient reason has been advanced to justify the FTC's action and its refusal to grant the stay was, therefore, arbitrary.

This policy statement which the FTC submitted to Congress in 1964 is far from an isolated pronouncement on this subject. Time and time again the Commission itself and the various members of the present Commission have gone on record reiterating this Commission policy of approaching industry-wide problems on an industry-wide basis and have offered convincing reasons for the Commission's adoption of that policy.

The Commission has stressed in statements to the Congress the inherent unfairness of enforcing the Act on a single competitor basis. In a Commission statement prepared for the House Committee on Appropriations, the FTC made the following report:

> "In enforcing the Robinson-Patman amendment to the Clayton Act . . . the FTC is tackling the problems on an industrywide basis if possible.
>
> "A key to the Commission's new approach is more careful planning of how best to cope with illegalities. Instead of shooting first and analyzing later, criteria are being further developed in our case selection to assure that we are not simply spending money and racking up statistics without commensurate results. *Simple fairness to competing business demands:* First,

an analysis of the illegality to determine its character and prevalence; second, a determination of the amount of public interest involved; third, that consideration be given to correcting, if possible, the illegality by illuminating it for all concerned or by accepting from violators their assurance the violation will be discontinued; and, finally, should these informal efforts fail (or be deemed insufficient), then to strike quickly at the *defiant* violator with the full force of the law. Such planning will enable the F.T.C. to husband its adversarial resources to attack hardcore violators. . . .'"[5] (Emphasis supplied)

The present Chairman of the Federal Trade Commission, Paul Rand Dixon, in testifying before this same House Subcommittee of the Committee on Appropriations, elaborated on this policy as follows:

"We have given a mandate to our enforcement bureaus. Instead of taking these cases as they come, one by one, *the first thing they are to determine is whether or not this is an isolated situation* that has come to our attention *or whether it is something that is engaged in competitively by all the competitors.* If so, to step back and, then with our resources, engage in what I would hope to be some basic planning and determine which would be the best tool and approach for us to take. . . .

"Historically, the Commission was wedded to the procedure of taking our customers or their cases as they came. The Commission had hoped . . . that with the tools that Congress had afforded the Commission to work with that even on the case by case

[5] FTC Statement, Hearings before a Subcommittee of the Committee on Appropriations, House of Representatives, Independent Offices, 89th Congress, 1st Session, Part 3, pp. 408-409. See also: Hearings before Subcommittee of the Committee on Appropriations, United States Senate, 89th Congress 1st Session, pp. 828-30.

method that proceeding against one, the others, if it affected them, would take notice and follow suit. It just didn't work that way. . . . *It could be said in all fairness to these people that if there were 50 engaged in the same practice, what certainty would a party have that if they stopped, the other 49 would stop.* In our country very rarely can a man be his brother's keeper. I think this is the basis of law. *We are trying to enforce our law in the American way, equitably and fairly.*'"[6] (Emphasis supplied)

On another occasion Chairman Dixon explained the reasons for the Commission's enforcement program in an address before a group of American businessmen, stating:

"It must be recognized that *some illegal practices are so widespread within an industry that to single out a few of the sinners would be unfair.* Simple justice would dictate that the approach to the problem be of sufficient scope to give all violators an opportunity to rid themselves of the illegality simultaneously and without suffering competitive injury in the process." (Emphasis supplied)[7]

In another address, Chairman Dixon has reiterated these sentiments, and pointed out, "The man who is willing to comply with the law simply can't afford to if a competitor is allowed to go on violating it."[8]

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[6] *ibid,* note 5, at 404-405.

[7] Paul Rand Dixon, an address before the Georgia Association of Broadcasters, Inc., Pine Mountain, Georgia, June 16, 1965.

[8] *Voluntary Law Enforcement: An Approach to "Administrative" Delay,* an address by Paul Rand Dixon, before the Briefing Conference on Restraint of Trade and Trade Regulations, Shoreham Hotel, Washington, D.C., March 17, 1965. See also an address by Commission-

Commissioner Mary Gardiner Jones of the present Commission, in an address before the Bar Association of the District of Columbia (February 25, 1965) stated as follows:

> "Industrywide enforcement of the law is almost a constitutiontal imperative as a matter both of fairness and for equality before the law. It is clear that we have no right to and could not permit some violators to go free while prosecuting others."

The court below relied upon this statement by Commissioner Jones, and the obviously valid opinion therein expressed, in reaching its decision in the instant case.

A review of Robinson-Patman Act proceedings before the Federal Trade Commission indicates that this announced policy has been consistently followed by the Commission except for this case.[9] Certainly it cannot be

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[8] (Continued)
er Everett MacIntyre, *Some Criteria for Applying Industrywide Enforcement Measures under the Robinson-Patman Act,* before the Indiana Continuing Legal Education Forum, Notre Dame University, September 25, 1965, wherein the quoted view of Chairman Dixon is endorsed by this member of the present Commission.

[9] Appendix B (FTC Br., p. 33) lists six Robinson-Patman Act decisions in which stays of orders have been denied. In *none* of these cases did the Commission enter an order to cease and desist against only one company and refuse to investigate others in the same industry engaged in the same pricing practice. Respondent respectfully subimts that it is an imposition on this Court for the Commission to cite cases such as *United Biscuit Co.,* 1963-65 Tr. Reg. Rep., Tr. Binder, § 16,749, as comparable to the case at bar, when its official reports show that United's major competitors were all under substantially identical orders entered either before or simultaneously with entry of the order by the Commission against United. See: *National Biscuit Co.,* 50 FTC 932, *Sunshine Biscuit Company,* 52 FTC 110,

seriously suggested that the eleven complaints, all issued on the same day challenging the same practice on the part of magazine publishers, occurred through sheer coincidence.[10] Similar treatment has been accorded to competitors in the Florida citrus fruit industry, an industry in which the Commission has issued over ninety cease and desist orders;[11] the same is true of the garment industry wherein the Commission has obtained 220 cease and desist orders;[12] the same is true in the carpet industry where eleven competitors were placed under cease and desist orders;[13] and the tobacco industry where five major competitors were placed under cease and desist orders;[14] the same is true of the electric shaver industry where four cease and desist orders have been issued;[15] in the

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[9] (Continued)
Schultze & Burch Biscuit Co., and *Robert A. Johnson Company*, 1963-65 Tr. Reg. Rep., Tr. Binder, §16,749. The same situation prevailed with regard to competitors of Southern Fruit, see Note 11, *infra*, and Dayco, an auto parts case. As to *Pacific Molasses*, that company's only competitor was already under a cease and desist order. 1963-65 Tr. Reg. Rep., Tr. Binder, §16,981. In *Graber Mfg. Co.*, the FTC has not yet entered an order (citation not possible). As to *Chun King Sales*, some three years after consenting to the entry of an order (58 F.T.C. 81), Chun King requested a stay in what appears to have been an obvious attempt to avoid a penalty proceeding for violations of the final order. (See: Trade Reg. Rep., Vol. 3, §9701,40 (1965) reporting penalties of $70,000 for violations of the order imposed on Chun King.)

[10] 57 F.T.C. 13 through 52.

[11] Table of Commodities Indexes, Vols. 57 through 60 of the FTC Official Reports.

[12] 1963-65 Trade Reg. Rep., Transfer Binder §§16,468, 16,534, 16,702.

[13] 1963-65 Trade Reg. Rep., Transfer Binder §16,800.

[14] 56 FTC 221, 258, 263, 269 and 275.

[15] 55 FTC 655, 665, 682 and 1017.

toy industry to date the Commission has issued at least 16 cease and desist orders;[16] and the seafood industry, where at least 23 cease and desist orders have been issued against various competitors.[17]

The cited proceedings are by no means all inclusive but they serve to clearly demonstrate that the FTC is enforcing the Robinson-Patman Act on an industry-wide basis. Thus, the Court of Appeals decision in this case does not require the FTC to embark upon some new or radical procedure. It merely calls upon that Agency to consistently apply the very policy which it has already been following. The FTC has made it clear that it is of the opinion that industry-wide enforcement is the policy best calculated to achieve the ends contemplated by Congress. Moreover, the FTC in other cases has stayed the effective date of a cease and desist order entered against a single competitor pending proceedings on an industry-wide basis. Thus, in *Atlantic Products Corp.* and *Atlantic Products Sales Corp.*, FTC Doc. 8513, ... FTC ..... (1963), 1963-1965 Trade Reg. Rep., Transfer Binder §16,676, the Commission, expressly recognizing the necessity for making a discretionary determination on this point in a case presenting a similar situation to the one at bar, held as follows:

> "Responsible exercise of the Commission's discretion in determining whether, and when, not to enter an immediate cease and desist order so that a general practice may be dealt with more comprehensively, may involve consideration of circumstances going beyond those reflected in the particular record. In the circumstances here we are inclined to withhold

[16] 61 FTC 629.

[17] Table of Commodities Index, Vol. 55 of the FTC Official Reports, at p. 2166.

entry of a cease and desist order against the instant respondent pending the outcome of the pending industrywide proceeding."

In the case at bar respondent never requested the Commission to go so far as it agreed to do in the above-quoted *Atlantic Products* case. All this respondent requested was that the Commission investigate its competitors and then determine whether immediate enforcement, as opposed to delayed enforcement pending industry-wide investigation, was the best course to effect compliance with the Robinson-Patman Act in the plumbing fixture industry. The Commission refusal to do so was arbitrary.

2. There is no conflict between the Court of Appeals decision in this case and this Court's prior decision in Moog Industries, Inc. v. F.T.C.

In its brief the FTC takes the position that this Court laid down a well-nigh inflexible rule in the consolidated cases of *Moog Industries, Inc.* v. *FTC and FTC* v. *C. E. Niehoff & Co.*, 355 U.S. 411 (1958), to the effect that courts of appeals may not interfere with FTC decisions denying stays of the effective dates of cease and desist orders. But, in its treatment of this Court's *Moog-Niehoff* decision the Commission overlooks entirely the factual background present in those cases which differs radically from that present in the instant matter.

Moog and *Niehoff* were just two of a large number of cases involving annual volume rebates in the "auto parts" industry. The Commission at the time those cases reached this Court had already investigated the auto parts industry, as an industry, and brought cases against those companies found to be granting annual volume rebates. Thus, in a brief filed on behalf of the Commission with

this Court in *FTC* v. *C. E. Niehoff & Co.*, October Term 1957, Case No. 110, the Commission told this Court:

> "Respondent [Niehoff] is not in a position to claim that the Commission made it a legal guinea pig. Within a relatively short time before or after the filing of the complaint against [Niehoff] the Commission filed 14 Section 2(a) complaints against members of the automotive replacement parts industry. Courts of Appeals have affirmed the . . . orders issued in six of these proceedings. . . . Two of the orders were against companies engaged in selling ignition line parts and named by respondent as competitors."

Respondent would note further that before this Court's decision in *Niehoff* was handed down a third one of Niehoff's competitors was already under an order and three others had been named in FTC price discrimination complaints. See: *Standard Motor Products*, 54 FTC 814; *Guaranteed Parts Co., Inc.* 53 FTC 433, and *Thermoid Company*, 55 FTC 518. It would indeed be difficult to find an industry subjected to a more vigorous *industry-wide* effort on the part of FTC to bring about regulation under the price discrimination statute than the auto parts industry in the 1950's.[1]

In contrast, the FTC's investigation in the case at bar was completed prior to August 4, 1960 and concerned respondent's pricing practices for the years 1957 through 1960. (R. 1-3). A decade has elapsed since the onset of the pricing practices which are the subject of this suit, but there has not been a single other complaint issued in the plumbing fixture industry. Here, then, is the first dis-

[1] See: Agency Enforcement Discretion, 41 N.Y.U. L. Rev. 964, 968 (1966), wherein the commentator lists the names, filing dates and docket numbers of the numerous FTC Robinson-Patman cases in the auto parts industry.

tinction in the factual situation presented by this case as contrasted to that in the *Moog-Niehoff* cases.

Another point which the FTC fails to mention is that the relief sought by *Niehoff*[2] was the staying of the effective date of the cease and desist order against it pending the successful prosecution of its competitors. In short, *Niehoff* was claiming, not that its competitors were being ignored by the FTC, but that the FTC order would go into effect against it before similar orders went into effect against its competitors. Respondent has never requested this relief. All respondent has asked is that the FTC investigate its competitors so that it can make a knowledgeable determination as to whether the proper course consonant with the statutory purpose is to enforce the order immediately or stay it. Therefore, when this Court was considering the propriety of the court of appeals having stayed enforcement of the order against *Niehoff*, the paramount issue was whether the Federal Trade Commission or the court of appeals was to decide the timetable for enforcement of orders in the auto parts industry. There was therefore no question in *Niehoff* concerning the Federal Trade Commission's refusal to investigate *Niehoff's* competitors—it had investigated and, obviously, it was in a position to make a knowledgeable determination as to how best to regulate the auto parts industry. In that industry the decision was to seek immediate enforcement of the Commission's order. Respon-

[2] C. E. Niehoff & Co. had raised the question of staying the order at the Commission level whereas Moog Industries, Inc. had not. This Court ruled that Moog was in no position to raise it since it had not exhausted its administrative remedies. In this brief, therefore, respondent limits its discussion to the C. E. Niehoff & Co. situation.

dent submits that there is a vast difference in a situation where a company's only complaint is that "the Commission came after me first," which was Niehoff's situation, and the situation in which this respondent finds itself, where it can justly complain "the Commission has attacked only me and decided to ignore my competitors."[3]

One leading authority in the field of administrative law, Professor Kenneth Culp Davis, in a recent comment, Judicial Control of Administrative Action, 66 Columbia Law Review 635, at 649 (1966) discusses this problem of abuse of what he terms "prosecutorial discretion", and states, "But I hope and expect the Court will interfere when it finds that such discretion has been abused. The law of the present and of the future is likely to be found in a decision just rendered by the Seventh Circuit to that effect". (citing the case at bar)

Professor Davis explains the need for judicial review in this area as follows:

> ". . . , the power not to prosecute is almost without protection of any kind; ulterior pressures can be applied without notice to parties with interests on the other side, without anything in the nature of a proceeding, without announcement of the decision, without any public view of what is going on, without

[3] The FTC claims that this respondent's showing was not as strong as the showing made by *Niehoff*, since in that case Niehoff claimed it would have to go out of business if it were required to comply with the order against it before its competitors were placed under orders. (FTC Br., p. 13). While it is true that *Niehoff* made this dire prediction in the cited case, this should hardly be a determinative factor in the present case. Surely, the Commission does not mean to suggest that only in cases wherein economic extinction is imminent should a respondent's plight be considered.

any record of what is done or undone, without findings, without reasons, without any real or pretended adherence to precedents, without legislative checks, and without executive check. Why not have a judicial check to the extent that clear abuses are brought to the attention of reviewing courts?

I predict that the court will become increasingly concerned with abuses of the prosecuting power. They should." (*supra*, at 649-50).

3. The court below did not err by reserving its judgment on the vadility of the cease and desist order.

On page nineteen of the FTC's brief the contention is made that the court below erred by failing to first pass on the cease and desist order before considering whether enforcement of that order should be stayed.

The Commission claims that it may be discommoded should it now bring "lengthy industry-wide proceedings in the pattern of the present case" and later have the court of appeals declare its order in the case at bar invalid. The Commission expresses fear that "a serious and unnecessary waste of the Commission's resources" might thus be occasioned.

This contention, when stripped to its bare essentials, means that all the official policy statements and public pronouncements of the Commission concerning "constitutional imperatives", "simple justice", "law in the American way, equitably and fairly", "simple fairness" and "competitively generated evil", should be considered meaningless. What the Commission is asking for in this Court is a test case, wherein it will use for its guinea pig one of the smallest members of the industry. It is clear that the Commission believed there was no necessity for a guinea pig in the magazine, tobacco, citrus

fruit, shaver, or garment industries where industry-wide enforcement was sought long prior to the review of any such case by a court of appeals. The Commission in its brief does not point to one such test case in the past, nor allude to any unique circumstances present in the plumbing fixture industry which would warrant this unusual course.

This same contention was presented in the Commission's petition for certiorari (Pet., p. 10, note 10), but it has undergone a not too subtle change in the FTC's present brief. Thus, in its petition the Commission claimed that its only fear was that the "agency's substantive theory" might be held erroneous. Respondent, in its opposition, had agreed that the Commission's argument might have been meritorious "if in the proceeding below respondent had challenged the Commission's substantive theory of violation on the ground of an erroneous legal theory." (Brief in Opposition, p. 21, note 1). But, respondent went on to point out, that the thrust of its challenge as to the validity of the order was basically centered on the sufficiency of the evidence to support the findings. This, in effect, was a challenge to the FTC to demonstrate to this Court precisely what new or novel legal theory was presented in the instant case. No answer to this challenge appears in the FTC's current brief. Instead, the FTC just adds a little something more to its contention. Now, it is claimed that in addition to fearing that its "substantive theory" may be declared erroneous, it also expresses doubts as to whether it applied the "proper standards of evidence" in its case against respondent. (FTC Br., p. 19)

Even assuming the latest contention has some validity, in the sense that the Commission's evidence may be in-

sufficient, how could a failure of evidence in the instant case affect the result in some other proceeding in this industry? For example, would a failure to prove the existence of competition between certain of respondent's customers mean that no competition could be proven to exist among some other manufacturers' customers—obviously not.

Respondent submits that the validity of the FTC's entire argument on this point is at best theoretical, but what the FTC has not done is to apply flesh to the theoretical skeleton it has raised. Respondent respectfully submits that this argument should be disregarded, especially in view of the Commission's actions in other industries and the statements and pronouncements of the Federal Trade Commission (*supra,* Section 1:C.), which clearly do not set up as a contingency the successful prosecution of a test case as a prerequisite to industry-wide enforcement of the Robinson-Patman Act.

4. The claim that the FTC is now powerless to investigate respondent's competitors because of pending Department of Justice proceedings under the Sherman Act is wholly lacking in merit.

Respondent did not remain idle following the Commission's refusal to grant the relief requested in its petition for a stay. It noted the categories of information which the Commission had stated in its order of August 4, 1964 would be necessary before that agency would be constrained to commence an investigation of respondent's competitors, and it went about gathering and submitting such information to the Commission.

With regard to two of its competitors, respondent furnished the names of their customers in a dozen different trading areas of the country. (FTC Br. Appendix C, pp.

52-3) Thus, by the time the case reached the Court of Appeals, the FTC, based on this additional information was forced to admit in its brief," . . . petitioner [respondent] submitted specific information to the Commission tending to show current violation of Section 2(a) by two competitors."[1] (FTC Brief before the 7th Cir., p. 52) Since respondent had met the Commission's terms and supplied the required information, at that point the reasons given by the FTC in its order of August 1964 denying the stay, at least as to these two competitors,[2] were no longer valid and acknowledged to be so by the FTC. It was therefore necessary, if the Commission was to justify its continuing refusal to investigate respondent's competitors, to find yet another reason for its reluctance to take any action. The FTC therefore advised the Court of Appeals that, even though the Commission had the necessary information, it would not then take any action because an investigation would conflict with a matter then being conducted by the Antitrust Division (R. 574). In its brief before the Court of Appeals, the FTC never explained to that court or to respondent why such a conflict would arise.

Now, in its brief before this Court, the FTC explains that the alleged conflict involved the question of witness

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[1] In its current brief the FTC attempts to deny that it made this admission in the lower court. The FTC now states, "Even assuming, as the court below apparently did (R. 574), that respondent had supplied sufficient information . . . to indicate that two of its competitors were offering illegal discounts . . ." (FTC Br., p. 22). The court didn't make any assumption, it accepted at face value the admission made in the Commission's brief (R. 574).

[2] The two competitors were the largest and second largest manufacturers of plumbing fixtures and their market share accounted for approximately 47% of the industry total (R. 572).

immunity. The Commission advises this Court, "Surely the Commission should not be compelled to engage in any activity such as the use of compulsory processes, conferring immunity upon witnesses—which would have interfered with such a proceeding." (FTC B., p. 23)

If practicalities are considered however, this immunity excuse simply evaporates. In the first place, the court of appeals did not hold that the Commission was required to successfully complete the prosecution of respondent's competitors before it could enforce its order against respondent, nor had this respondent ever requested such relief. What the court of appeals found erroneous in the Commission's denial of the stay was its refusal to *investigate*. Thus, the court held:

> "An investigation of an industry is germane to a proceeding before the Commission, and it has a duty to so investigate in a proper case. . . . The Commission was the proper forum to receive and act upon the result of such an investigation . . . " (R. 575)

What danger there was of conferring immunity *by investigating* is therefore the problem to be considered.

The real answer to this immunity contention is that the FTC has at least four investigative techniques at its disposal to conduct investigations of possible violations of Section 2(a), none of which involve the taking of testimony from individuals or the requirement that individuals produce evidence.[3] Thus, the FTC could have attempted to obtain this information by requesting a voluntary submittal from each of the competitors, a method which the FTC in its Rules of Procedure states to be its preferred

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[3] The immunity provisions are strictly limited to natural persons and have no application to corporate entities. 15 U.S.C. 49, reprinted, Appendix B, *infra*, p. 3a.

manner of conducting investigations. (See: Subpart D, Sec. 1.31, Rules of Practice of the Federal Trade Commission; Appendix A, page 10a, infra.) If these were refused, the FTC could have compelled "submission" of this information from each corporate competitor by issuing an order for special reports under Section 6 of the Federal Trade Commission Act.[4] 15 U.S.C. 46(b) (reprinted, Appendix B, p. 2a, *infra*). As a third alternative, the Commission could have obtained the information it needed by the serving of subpoenas *duces tecum* on each of the corporate competitors. Finally, the FTC could have exercised its power under Section 9 of the FTC Act which enable it to obtain access, for the purposes of examining and copying, to any documentary evidence of any corporation under investigation. 15 U.S.C. 49, (reprinted, Appendix B, p. 2a, *infra*).

Regardless of which of these four methods the Commission chose, none would have posed an immunity problem with regard to the Antitrust Division's proceedings, because *no individual would have been required to give any testimony* in the FTC's investigation. Respondent can speak from first-hand experience, because not a single individual in its employ was compelled to testify or

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[4] See: *Problems of Enforcement Procedure and Remedy under the Robinson-Patman Act*, 17 ABA Antitrust Section (1960) 427, at 431, wherein the then General Counsel of the Commission stated:

> "Reports under Section 6(b) of the Federal Trade Commission Act [are] the really significant compulsory process, which has proven to be particularly adaptable to Robinson-Patman Act investigations.
>
> • • •
>
> ". . . in reports under Section 6(b) we likely have found 'the weapon' so necessary to effect prompt, efficient, industry-wide enforcement of the statute."

See also: *St. Regis Paper Co.* v. *U. S.*, 368 U.S. 208 (1961).

produce evidence by the FTC in its pre-complaint investigation of respondent's pricing practices.

The total lack of merit to the FTC's contention as to a possible conflict comes vividly into focus when it is considered that the FTC in the very same letter (FTC Brief, Appendix C p. 55) wherein it was first stated that a possible conflict with the Department of Justice might arise if it were to investigate respondent's competitors under Section 2(a), it admitted that at that very time the Commission was conducting an investigation of one of the plumbing fixture manufacturers for possible violations of Section 2(d) and Section 3 of the Clayton Act, as well as Section 5 of the F.T.C. Act. The Commission ventures no explanation to this Court as to why those investigations could be conducted without danger of conferring immunity upon individuals, yet on the other hand, investigations for 2(a) violations would have such a result.

The FTC also suggests (FTC Br., p. 22) that a 2(a) Commission investigation would have been contrary to the Congressional intent because the Commission and the Department of Justice should function as effective "partners", rather than "rivals". An effective partnership in the enforcement of the antitrust laws, respondent respectfully submits, is not achieved when the Commission refuses to take any action to determine whether a section of the antitrust laws, the enforcement of which is primarily its responsibility, has been violated, merely because its partner is conducting an investigation in the same industry concerning a possible violation of a different antitrust statute for which the other agency has the sole enforcement responsibility. In such a situation one of the partners has obviously abdicated the duty imposed upon it by the Congress, which is the very antithesis of an

effective, coordinated antitrust enforcement program by both agencies.[5]

CONCLUSION

For all the foregoing reasons respondent prays that the decision of the Court of Appeals for the Seventh Circuit be affirmed by this Court.

Respectfully submitted,

FRANK C. MCALEER
JAMES R. FRUCHTERMAN
120 South LaSalle Street
Chicago, Illinois 60603
Attorneys for Respondent

ARNSTEIN, GLUCK, WEITZENFELD & MINOW
120 South LaSalle Street
Chicago, Illinois 60603
Of Counsel

[5] The agreement between the two agencies specifically recognizes that each agency must make an "independent" decision concerning the investigations each will undertake. *Report of the Attorney General's National Committee To Study the Antitrust Laws* (1955), page 376, note 53.

APPENDICES

APPENDIX A

The Rules of Practice for the Federal Trade Commission (August 1963) provide as follows:

"Subpart D—Investigations

§1.31 Investigational policy.—The Commission encourages voluntary cooperation in its investigations. Where the public interest requires, however, the Commission may, in any matter under investigation, invoke any or all of the compulsory processes authorized by law."

APPENDIX B

The Federal Trade Commission Act, 15 U.S.C. 46, in pertinent part provides as follows:

"Sec. 6. That the commission shall also have power—

(b) To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission.

• • •

"Sec. 9 Evidence. Witness. Testimony. Mandamus To Enforce Obedience To Act (38 Stat. 722; 15 U.S.C.A., sec. 49.)

"Sec. 9. That for the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against;

• • •

"No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it: *Provided,* That no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying."

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ADDENDUM TO PETITIONER'S BRIEF.

Comes now petitioner and respectfully brings to the attention of this Court the following developments since the printing of petitioner's brief filed on April 23, 1965.

On April 16, 1965 petitioner's counsel, while at the Washington offices of the Federal Trade Commission on other matters, was asked by Commission's attorney W. Risque Harper whether petitioner had used the exchange of correspondence between petitioner's counsel and FTC complaint counsel Stanley M. Lipnick (Appendices A and B to petitioner's main brief), in its brief to be filed with this Court. The FTC attorney was advised that petitioner had brought the correspondence to the attention of this Court in its brief in its argument that the Federal Trade Commission had abused its discretion in refusing to temporarily stay the order entered in the instant case and undertake any investigation of petitioner's competitors. (See pp. 65-69 petitioner's main brief).

When petitioner's counsel returned to his offices after the above conversation, he received on April 21, 1965, after petitioner's brief had been sent to the printer, a letter dated April 19, 1965 wherein FTC complaint counsel, Stanley M. Lipnick, advised that the reason the

FTC would not *now* undertake any industry-wide investigation of petitioner's competitors was that such an investigation would conflict with an investigation now being conducted by the Antitrust Division of the Department of Justice.

Respectfully submitted,

FRANK C. MCALEER
JAMES R. FRUCHTERMAN
120 So. LaSalle St.
Chicago, Illinois
Attorneys for Petitioner

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 101

FEDERAL TRADE COMMISSION, PETITIONER

v.

UNIVERSAL-RUNDLE CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL TRADE COMMISSION

Respondent makes three arguments in support of the decision below directing the Federal Trade Commission to stay its cease-and-desist order and to conduct an industry-wide investigation of respondent's competitors. None of them will bear scrutiny.

1. Respondent first urges (Br. 12–18) that the action of the court of appeals was warranted because enforcement of the cease-and-desist order would subvert "the statutory purpose of protecting, rather than impairing the competitive opportunities of respondent, a small competitor at the seller level of competition" (Br. 15),[1] and that the Commission improperly

[1] Respondent's characterization of itself as a "small competitor" is based on an analysis that ignores respondent's relationship to Sears, Roebuck and Co. (R. 50 n. 4). More than 60 per cent of respondent's capital stock is owned by Sears, and a substantial proportion of respondent's production is sold to Sears.

failed to determine "[whether] the cease-and-desist order should not be stayed because any possible competitive impairment to respondent occasioned thereby would be outweighed by the adverse effects reasonably predictable in the secondary line if enforcement of the cease and desist order were to be delayed" (Br. 16).[1] We deny that the Commission is obligated to make that determination; but that question need not be reached because the record here does not establish that respondent would suffer significant injury if it were not permitted to continue its illegal price discriminations.

Respondent's petition for the withdrawal of the cease-and-desist order (R. 46–53) stated that its principal competitors were enjoying substantial profits (R. 51) whereas respondent had experienced losses during the preceding three and one-half years (R. 52). Respondent also submitted the affidavit of its marketing vice-president (R. 54–56) stating that "the Company may suffer further substantial financial losses if it must be the sole plumbing fixture manufacturer under an order to cease and desist."

The Commission did not ignore this material. On the contrary, it pointed out that "the fact that respondent may have incurred losses prior to the issuance of the order does not support the contention that enforcement of the order will cause it financial

[1] The Commission found that "the price differentials involved in this proceeding were sufficient to give the recipients of the lower prices a substantial advantage over their non-favored competitors" and therefore were likely to injure, destroy, prevent or substantially to lessen competition at the secondary level, *i.e.*, among respondent's customers (R. 40–44).

hardship" (R. 63). The Commission's conclusion that respondent had failed to make a substantial showing of prospective injury was amply supported by respondent's own argument to the Commission, in connection with the scope of the order, that its discriminatory practices were unique to the Philadelphia-Camden area—the area in which the existence of a differential between truckload and less-than-truckload prices had been proved. Respondent stated: "In the areas chosen by the Commission's counsel to present evidence there exists a special circumstance, *close proximity to respondent's plants*, and this circumstance simply does not occur throughout the balance of the country." (Appeal Brief for Respondent before the FTC, p. 56; emphasis in original). If, as respondent apparently suggests, it either cannot or does not engage in price discrimination "throughout the balance of the country," it is difficult to understand how respondent could suffer serious hardship by a general prohibition upon its granting such discriminations.

Under these circumstances, the Commission's rejection of respondent's prophecy of injury and its refusal to stay its order cannot be said to subvert the purposes of the Clayton Act.[2] On the other hand, the ruling of the court of appeals that respondent's "showing was sufficient to require the Commission to make petitioner's competitors parties" (R. 575) constituted an impermissible substitution of the court's

[2] The Commission's refusal to stay its order would not, of course, preclude respondent from seeking treble damages and injunctive relief against its competitors under Sections 4 and 16 of the Clayton Act.

own discretionary determination for that of the Commission. See *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 169.

2. Respondent's second argument is that the Commission patently abused its discretion by failing to investigate respondent's competitors, thereby "precluding itself from making a knowledgeable determination as to whether the order against respondent should have been enforced immediately or stayed" (Br. 8, 18–22). This argument rests on the contention that, under *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411, "in a situation such as that which was present when respondent petitioned for a stay, the Commission has a *duty* to investigate and find out whether an allegedly illegal practice is in fact industry-wide in scope" (Br. 18–19; emphasis in original). In the light of respondent's petition for relief to the Commission, we assume that the contention must be that the agency was required both to conduct an investigation and to stay its order in the interval; respondent obviously was not merely seeking an investigation without a stay.[3]

[3] Although respondent now asserts (Br. 32, 38) that it never requested a stay pending the entry of orders against its competitors, its petition to the Commission requested the following relief: (1) "[A] temporary stay of the order to cease and desist pending the Commission's decision on the instant petition." (2) Withdrawal of the cease-and-desist order. (3) An order staying re-entry of the order (R. 46). The petition also suggested that the order not be re-entered for at least 18 months, and then only after 30 days notice to respondent (R. 46–47). Finally, the petition urged the Commission that the cease-and-desist order be stayed "pending *corrective action* of industry-wide practices of competitors" (R. 53; emphasis added). The term

But *Moog* clearly does not impose on the Commission any duty to conduct an industry-wide investigation. In *Moog* this Court recognized that the decision whether to make an order against a single firm effective "before others are similarly prohibited" involved "a variety of factors peculiarly within the expert understanding of the Commission." 355 U.S. at 413. In pointing out that the shaping of remedies "within the framework of regulatory legislation" is committed to the "specialized, experienced judgment" of the agency rather than to the courts, the Court listed several of such factors, including the determination whether allegedly illegal practices that appear to be industry-wide are in fact so extensive. But in giving this example the Court was not directing the Commission to conduct an industry-wide investigation whenever a respondent asserts that there is an industry-wide illegal practice. For the decision whether to do so—no less than the decision whether to stay an order against one firm in an industry pending the entry of orders against the others—lies "within the special competence of the Commission," which "alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically." 355 U.S. at 413.

"corrective action" would seem to imply discontinuance of illegal practices—either voluntarily or pursuant to order. Moreover, the decision of the court of appeals (R. 575) requires the Commission not merely to investigate respondent's competitors, but to make them parties to the proceeding before it—presumably through the issuance of complaints.

The Commission concluded in the present case that, since truckload discounts do not constitute a *per se* violation of Section 2(a), "the general allegation by respondent that its competitors are granting truckload discounts is not a sufficient basis for instituting industry-wide proceedings to condemn this practice nor is it a valid reason for withholding enforcement of the order entered against respondent in this matter" (R. 63). That conclusion did not, of course, preclude particularized investigations wherever complaints and information supplied by respondent or others indicated such investigation was warranted.[4] It did, however, reflect an exercise of the Commission's "specialized, experienced judgment." The way in which the Commission brings such judgment to bear upon a particular case involves the sum of the agency's "cumulative experience" (*National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 349),[5] and obviously cannot be fully substantiated by "citation to the record" (Resp. Br. 21). In determining whether to commit its limited resources to any par-

[4] Pursuant to information subsequently received (see the Commission's main brief, App. C, p. 55), the Commission instituted an investigation of one of respondent's competitors. That investigation is now in progress. While respondent's petition before the Commission referred to six of respondent's competitors, respondent's vice-president identified some 17 competitors in his testimony before the hearing examiner (R. 112). While calling for an "industry-wide" investigation, respondent never expressed any view as to the pricing practices of 11 of 17 of its competitors.

[5] Respondent appears to recognize this, since it quotes (Br. 29) from the Commission's decision in *Atlantic Products Corp.*, 1963–1965 Trade Reg. Rep. ¶ 16,676 (transfer binder), where the Commission observed: "Responsible exercise of the

ticular investigation, the Commission cannot and need not spell out its mental processes nor itemize the experience and source of information that inform its discretion. See *United States* v. *Morgan,* 313 U.S. 409, 422.

Respondent's contention that the Commission was required to conduct an industry-wide investigation in order to make an informed judgment on whether to stay the order against respondent challenges the sufficiency of the information available to the Commission in formulating enforcement policy; it does not raise a question that is appropriate for judicial reexamination. If the respondent could, as it supposes, require the Commission to satisfy the courts that its decision not to proceed against respondent's competitors was adequately supported by identifiable data, the files and internal communications of the Commission would be the subject of continuous scrutiny and the courts would be obliged to assess the thoroughness and scope of prior investigations, the soundness of staff analyses and recommendations, and all the other factors informing the Commission's decision. It seems too clear for argument that no administrative agency could function on that basis. It is precisely for these reasons, we believe, that *Moog* held that the Commission's discretionary determinations are not to be overturned in the absence of a patent—*i.e.* self-evident—abuse of discretion. Respondent's allegation that the Commission was insufficiently informed when it re-

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Commission's discretion in determining whether, and when, not to enter an immediate cease and desist order * * * may involve consideration of circumstances going *beyond those reflected in the particular record*" (emphasis added).

fused to stay the order calls for an exploration of the Commission's cumulative experience and, therefore, is not the kind of claim upon which courts may overturn an agency's discretionary determination.

Respondent's assertion (Br. 22) that "[i]t is clear, very clear * * * that the Commission had *not* investigated to determine whether petitioner's competitors were also violating the law * * *" (emphasis in original), is thus quite irrelevant; it is also unwarranted. Between 1957 and 1961 the Commission conducted a comprehensive investigation of alleged violations of Section 2(a) and 2(e) of the Clayton Act, as amended by the Robinson-Patman Act by respondent's largest competitor, American Radiator & Standard Sanitary Corp., which it closed because it concluded that there was insufficient basis for issuing a complaint. Another factor, not reflected in the record but relevant to the Commission's decision, is the fact that, prior to the denial of respondent's stay application on August 4, 1964, the Commission was informed in confidence by the Department of Justice that the Antitrust Division was conducting an investigation of the Plumbing Fixture Manufacturers Association of which respondent and its principal competitors are members. The Commission, of course, normally treats such matters as confidential.[6] We mention them here only because they serve to refute respondent's charges and to indicate the inappropriateness—indeed the impossibility—of judicial reexamination of agency enforcement policy.

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[6] See Federal Trade Commission, *Organization, Procedures, Rules of Practice, and Statutes* §§ 1.12(d), 1.133 (1963).

3. Respondent's third argument (Br. 22–30) is that the Commission's refusal to stay its order was an abuse of discretion because contrary to the Commission's announced policy of proceeding against statutory violations on an industry-wide basis wherever appropriate. Respondent correctly points out that in recent years the Commission has become increasingly sensitive to the inefficiency and the potential unfairness of proceeding against a single offender in an industry in which violations are widespread or universal. In practice the Commission has attempted to determine, prior to the commencement of an adjudicatory proceeding, whether there is reason to believe that an unlawful practice, allegedly being pursued by one firm, is or is not a common practice of the industry. The procedure adopted by the Commission has been described by Commissioner MacIntyre:[7]

> The enforcement bureaus have been instructed that they are no longer to report to the Commission recommendations on single complaints without further advising as to whether the alleged unfair practice is general in the industry. If the alleged law violation is widespread, then the staff is expected to recommend some program and plan for dealing with the industry-wide nature of the problem.

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[7] Statement by Commissioner MacIntyre, *Some Criteria for Applying Industry-Wide Enforcement Measures Under the Robinson-Patman Act*, p. 3 (Sept. 25, 1965). A copy of Commissioner MacIntyre's statement has been lodged with the Court by respondent. See Chairman Dixon's testimony in *Hearings before the Subcommittee of the Senate Committee on Appropriations, Independent Offices Appropriations, 1966*, 89th Cong., 1st Sess. (1965) p. 323.

That procedure does not preclude the Commission from proceeding on an individualized basis when it deems that approach preferable. As the statements cited by respondent make clear, the Commission has not purported to bind itself to conduct industry-wide proceedings in every instance. Thus, Commissioner MacIntyre observed in the statement quoted above and cited by respondent (Br. 27, n. 8):

> It has been argued, and possibly with some logic, that to be completely fair the Commission should proceed simultaneously against all industry members suspected of violating the price discrimination act. Obviously, this is not possible in all cases where litigation is employed simply because of the Commission's restricted budgetary and manpower resources.

Similarly, Commissioner Jones, in the address quoted by respondent (Br. 27), also observed:[8]

> The Commission's case-by-case technique of law enforcement is of major importance in stopping law violations and defining through its decisions the conduct which it regards as violative of the statutes. It is also an imperative in maintaining respect for those laws and in achieving voluntary compliance with them.

In short, respondent's suggestion that the decision below "merely calls upon [the Commission] to con-

[8] Address by Commissioner Jones before the Bar Association of the District of Columbia (February 25, 1965) p. 4. This portion of Commissioner Jones' speech was quoted with approval in the opinion of the Commission in *Modern Marketing Service, Inc.* and *C. H. Robinson Co.*, Docket Nos. 3783, 4589 (January 7, 1966).

sistently apply the very policy which it has already been following" (Br. 29) rests upon a misunderstanding of that policy.

Furthermore, the proceeding against respondent arose in a context that fully warranted an individual rather than an industry-wide approach. As respondent has recognized (Br. for FTC, App. C, 41), "initially the investigation was entirely unrelated to the matter of truckload discounts." In its inception, the proceeding against respondent was a companion matter to a proceeding against Sears, Roebuck and Co.[9] The complaints against respondent and Sears, which were issued on the same day, charged that respondent supplied Sears, and Sears (owning a majority of respondent's capital stock) induced it to supply, plumbing-fixtures, under Sears' "Homart" brand, at lower prices than respondent sold such fixtures to other dealers under its own "U/R" brand, in violation of Sections 2(a) and 2(f) of the Clayton Act, as amended by the Robinson-Patman Act, respectively. The complaint against respondent also charged it with price discriminations between different purchasers of its own "U/R" brand fixtures (R. 2–3). But it was not until July 1963, when the hearing examiner ruled (R. 484) that the "Homart" and "U/R" lines were not of like grade and quality, that the case against respondent settled into its present mold. Indeed, it was not until July 1965, after the case had been concluded and the cease-and-desist order had been entered, that respondent for the first time urged the Commission to proceed

[9] See *Sears, Roebuck and Co.* v. *Federal Trade Commission*, 210 F. Supp. 67 (D.D.C.).

against other plumbing fixture manufacturers. Against this background it is clear that originally the present proceeding was ancillary to the main case involving discriminations in favor of a single large retailer;[10] it was not, as the court below supposed (R. 573), an "attack against a general practice which is prevalent in the [plumbing fixture] industry." It is apparent, therefore, that the Commission's present policy of assessing at the outset the prevalence in an industry of an allegedly unlawful practice would have had little, if any, bearing on the conduct of this proceeding.

4. As we have noted above (p. 4), in determining not to stay its cease-and-desist order, the Commission in no way precluded respondent from supplying information and requesting the institution of proceedings against others,[11] and respondent has availed itself of the opportunity to do so. On April 19, 1965, however, Commission counsel advised respondent's counsel that a requested investigation of American Radiator & Standard Sanitary Corp. and The Kohler Co. could not be undertaken because the Commission had been advised that "such an investigation would conflict with an investigation now being conducted by the Antitrust Division" (Br. for the

[10] Sears, Roebuck's annual sales volume exceeds $3 billion.

[11] Section 1.12(a) of the Commission's General Procedures provides: "Any individual, partnership, corporation or organization may request the Commission to institute a proceeding in respect to any matter over which the Commission has jurisdiction."

FTC, App. C, p. 55). Respondent now derides the possibility of such conflict (Br. 36–41) and, indeed, implies (Br. p. 5, n. 2; App. C 4a–5a) that the supposed conflict was invented by the Commission to frustrate respondent's quest for justice.

The fact is that in March 1965 an investigation by the Antitrust Division into price-fixing in the plumbing fixtures industry had proceeded to the point that the Division had sought authorization to impanel a grand jury. Thereafter, a grand jury in the Western District of Pennsylvania returned two indictments [12] charging respondent, numerous other manufacturers and individuals with conspiring to fix prices. It was, therefore, hardly surprising that, on March 22, 1965, the Antitrust Division requested the Commission not to proceed with an investigation of American Radiator and Kohler, who were among the eventual indictees. Accordingly, respondent's suggestion that the denial of clearance was somehow feigned or fabricated is altogether groundless.

Also without merit is respondent's further contention that no real conflict existed between the Antitrust Division's investigation and the Commission's potential investigation because, without any danger of conferring immunity to prosecution on any of the prospective criminal defendants (under Section 9 of the Federal Trade Commission Act), the Commission could have investigated American Radiator and Kohler even if it could not have prosecuted them. In the first place, it is clear that a Commission inves-

[12] Criminal Nos. 66–295 and 66–296 (W.D. Pa.) returned on October 6, 1966.

tigation of American Radiator or Kohler that could not, if the evidence warranted, proceed to adjudicatory hearing would waste the Commission's resources and would fail to provide respondent with the relief it seeks, *i.e.*, the entry of cease-and-desist orders against its competitors.

More important, it is well known that the Commission and the Antitrust Division have a long-standing agreement under which they clear investigations with each other.[13] That agreement reflects a practical method of dealing with the overlapping jurisdictions of the two agencies so as to avoid duplication of effort and mutual frustration. The assessment of the risk of conflict in any particular case is obviously a matter of judgment and discretion and the accommodation reached between the agencies is not susceptible to judicial review. We do, however, note that the risks of frustration through immunization in this case are hardly as remote as respondent suggests. On February 17, 1967, respondent's former vice-president, Stanley S. Backner, a defendant in one of the pending price-fixing cases,[14] moved to dismiss the indictment as to him on the ground that:

> Defendant Backner, on October 15 and 16, 1962, testified as a witness for the Federal Trade Commission, in obedience to a subpoena issued by the Commission, in *In the Matter of Universal-*

[13] See *Report of the Attorney General's National Committee to Study the Antitrust Laws*, 376 (1955).

[14] *United States* v. *American Radiator & Standard Sanitary Corp., et al.*, Crim. No. 66-295 (W.D. Pa.).

Respondent's counsel in the present case does not represent Mr. Backner in that proceeding.

Rundle Corporation (FTC Docket No. 8070). Such testimony concerned "transactions, matters, and things" for which he is being prosecuted on the instant indictment and he is therefore entitled under Section 9 of the Federal Trade Commission Act, 38 Stat. 722 (1914), 15 U.S.C. 49, to immunity from such prosecution.

The possibility of such claims of immunity demonstrates why caution is the course of wisdom where the possibility of interagency collision is real.

Respectfully submitted,

THURGOOD MARSHALL,
Solicitor General.

DONALD F. TURNER,
Assistant Attorney General.

ROBERT S. RIFKIND,
Assistant to the Solicitor General.

JAMES MCI. HENDERSON,
General Counsel,

J. B. TRULY,
Assistant General Counsel,

W. RISQUE HARPER,
Attorney,
Federal Trade Commission.

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SUPREME COURT OF THE UNITED STATES

No. 101.—October Term, 1966.

Federal Trade Commission, Petitioner, *v.* Universal-Rundle Corporation.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[May 29, 1967.]

Mr. Chief Justice Warren delivered the opinion of the Court.

The question presented by this case is whether the Court of Appeals exceeded its authority as a reviewing court by postponing the operation of a Federal Trade Commission cease-and-desist order against respondent until an investigation should be made of alleged industry-wide violations of the price discrimination provisions of the Clayton Act, § 2, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. § 13.

Respondent Universal-Rundle produces a full line of china and cast-iron plumbing fixtures which it sells to customers located throughout the United States. In 1960, the Federal Trade Commission issued a complaint charging that for more than three years Universal-Rundle's sales to some of these customers had been made "at substantially higher prices than the prices at which respondent sells such products of like brand and quality to other purchasers, some of whom are engaged in competition with the less favored purchasers in the resale of such products." The effect of the discriminations, the complaint alleged, "may be to substantially lessen competition" in violation of § 2 (a) of the Clayton Act, as amended. In its answer, Universal-Rundle denied the essential allegations of the complaint, and, in addi-

tion, asserted as affirmative defenses that such price differentials as may have existed were cost justified or were made "in good faith to meet competition."

After evidentiary hearings, in which Universal-Rundle made no effort to sustain its affirmative defenses, the Commission found that during 1957 Universal-Rundle had offered "truckload discounts" averaging approximately 10% to all of its customers. Because some of these customers could not afford to purchase in truckload quantities, and thus were unable to avail themselves of the discounts, the Commission held that the offering of the truckload discounts constituted price discrimination within the meaning of § 2 (a) of the Clayton Act, as amended. Since some Universal-Rundle customers who were able to purchase in truckload quantities were found to be in competition with customers unable to take advantage of the discounts, the Commission concluded that Universal-Rundle's price discrimination had the anticompetitive effect proscribed by § 2 (a).[1] Accordingly, it ordered Universal-Rundle to refrain from:

> "Discrimination in price by selling 'Universal-Rundle' brand or Universal-Rundle manufactured plumbing fixtures . . . of like grade and quality to any purchaser at prices higher than those granted any other purchaser, where such other purchaser competes in fact with the unfavored purchaser in the resale or distribution of such products."

At no time during the four years in which the complaint was pending did Universal-Rundle offer the Commission any information as to its competitors' pricing practices or suggest that industry-wide proceedings might be appropriate. But one month after the issuance of the cease-and-desist order, Universal-Rundle petitioned the Commission to stay its cease-and-desist order for a time

[1] The Commission's opinion is reported in Trade Reg. Rep., 1963–1965 Transfer Binder, ¶ 16,948.

sufficient "to investigate and institute whatever proceedings are deemed appropriate by the Commission to correct the industry-wide practice by plumbing fixture manufacturers of granting discounts in prices on truckload shipments." In support of its petition, Universal-Rundle submitted affidavits and documents tending to show: (1) that its principal competitors were offering truckload discounts averaging approximately 18%; (2) that Universal-Rundle's share of the plumbing fixture market, exclusive of its sales to Sears, Roebuck and Co., was 5.75% whereas the five leading plumbing manufacturing concerns enjoyed market shares of 6 to 32%; [2] and (3) that each of these five competitors had reported profits within the preceding two years whereas Universal-Rundle had sustained substantial losses during each of the preceding three years. In addition, Universal-Rundle submitted an affidavit in which its marketing vice president declared on information and belief that some of Universal-Rundle's competitors were selling to customers who "may not purchase in truckload quantities." The vice president further averred:

> "That based on his knowledge of the competitive conditions in this industry, if respondent is not permitted to sell plumbing fixtures with a differential in price as are its competitors on truckload and less than truckload quantities, respondent's sales of plumbing fixtures under the 'U/R' brand will be

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[2] According to respondent's petition for a stay, the shares enjoyed by its principal competitors were:

	Percent
American Radiator & Standard Sanitary Corp.	32
Kohler Co.	15
Eljer Division of the Murray Corp. of America	10
Crane Co.	9
Briggs Manufacturing Co.	6
Rheem Manufacturing Co.	5

> substantially decreased and lost to its competitors, who continue to offer substantial discounts on truckload shipments. And he is of the further belief [that] the Company may suffer substantial financial losses if it must be the sole plumbing fixture manufacturer under an order to cease and desist."

In a unanimous decision denying the petition for the stay, the Commission held that a general allegation that competitors were offering truckload discounts was not a sufficient basis for instituting industry-wide proceedings or for withholding enforcement of the cease-and-desist order. Noting that respondent's petition appeared to be premised on the contention that truckload discounts had been held to be *per se* illegal, the Commission wrote, "There is nothing in our decision to support this contention, . . . nor does the order to cease and desist entered against respondent absolutely prohibit it from granting truckload discounts." While the granting of such discounts may result in price discriminations having proscribed anticompetitive effects, "the practice is not necessarily illegal as indicated in respondent's petition." In each case, it must be determined:

> "whether the discount creates a price difference, whether the recipient of such a discount is competing at the same functional level with a customer paying a higher price, whether the customer buying in less than truckload quantities is able to avail itself of the truckload discount, and whether the differential is sufficient in the competitive conditions shown to exist to have the requisite anticompetitive effects." [3]

[3] The Commission further noted that "even if a prima facie violation of Section 2 (a) is established, the seller may in each case interpose the statutory defenses to justify the discrimination." Trade Reg. Rep., 1963–1965 Transfer Binder, ¶ 16,998, at 22,070.

"Moreover," the Commission wrote, "the fact that respondent may have incurred losses prior to the issuance of the order does not support the contention that enforcement of the order will cause it financial hardship."[4]

Following denial of its petition for a stay, Universal-Rundle instituted review proceedings in the Court of Appeals for the Seventh Circuit. Without reaching the merits of the petition to set aside the cease-and-desist order, the court below set aside the Commission's order denying the stay and remanded the cause with instructions that the Commission conduct an industry investigation. 352 F. 2d 831 (1965). The court conceded that under *Moog Industries* v. *Federal Trade Commission*, 355 U. S. 411 (1958), the Federal Trade Commission's discretionary determination to refuse to stay a cease-and-desist order "should not be overturned in the absence of a patent abuse of discretion." 355 U. S., at 414. But it considered that Universal-Rundle's evidentiary offering was sufficient to demonstrate that the refusal to grant the requested stay constituted a patent abuse of discretion. The premises upon which the court below based its conclusion may be briefly restated: (1) "it is apparent," the court wrote with reference to the evidentiary offering, "that the Commission has directed its attack against a general practice which is prevalent in the industry"; (2) enforcement would lead to the "sacrifice" of one of the "smallest participants" in the industry; and, consequently, (3) approval of the enforcement sanctions would be contrary to the purposes of the Clayton Act since "the giants in the field would be the real benefactors—not the public."

In *Moog Industries* v. *Federal Trade Commission*, *supra*, we set forth the principles which must govern

[4] *Ibid.*

our review of the action taken by the court below: The decision as to whether to postpone enforcement of a cease-and-desist order "depends upon a variety of factors peculiarly within the expert understanding of the Commission." 355 U. S., at 413. Thus, "although an allegedly illegal practice may appear to be operative throughout an industry, whether such appearances reflect fact" is a question "that call[s] for discretionary determination by the administrative agency." *Ibid.* Because these determinations require the specialized experienced judgment of the Commission, they cannot be overturned by the courts "in the absence of a patent abuse of discretion." 355 U. S., at 414. Consequently, the reviewing court's inquiry is not whether the evidence adduced in support of a petition for a stay tends to establish certain facts, such as that the industry is engaged in allegedly illegal price discrimination practices; rather, the court's review must be limited to determining whether the Commission's evaluation of the merit of the petition for a stay was patently arbitrary and capricious.

Viewed in the light of these principles, the decision below must be reversed. The evidence which Universal-Rundle offered in its petition for a stay is so inconclusive that it cannot be said that the Commission's evaluation of the evidence, and its consequent refusal to grant the stay, constituted a patent abuse of discretion. Indeed, Universal-Rundle's evidence does not even support the improper *de novo* findings which formed the basis for the Court of Appeals' decision. Universal-Rundle's truckload discounts were held to be illegal only because the corporation sold fixtures to one group of customers who were unable to purchase in truckload quantities while simultaneously selling fixtures at a discount to another group of customers who were in competition with the nonfavored group. Since the evidence presented in the petition for a stay did not tend to show

that the discounts offered by Universal-Rundle's competitors had such an anticompetitive effect, there was no basis for a conclusion that the practice held illegal by the Commission was prevalent throughout the plumbing industry. Similarly, the unsupported speculation of Universal-Rundle's vice president as to the pecuniary effect of enforcement of the cease-and-desist order does not provide a sufficient basis for a finding that Universal-Rundle would be "sacrificed" or even that it would suffer substantial financial injury. It follows that Universal-Rundle has failed to demonstrate that enforcement would be contrary to the purposes of the Clayton Act.

We note that even if a petitioner succeeded in demonstrating to the Commission that all of its competitors were engaged in illegal price-discrimination practices identical to its own, and that enforcement of a cease-and-desist order might cause it substantial financial injury, the Commission would not necessarily be obliged to withhold enforcement of the order. As we stated in *Moog Industries*, 355 U. S., at 413:

> "It is clearly within the special competence of the Commission to appraise the adverse effect on competition that might result from postponing a particular order prohibiting continued violations of the law. Furthermore, the Commission alone is empowered to develop the enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically."

On the other hand, as the *Moog Industries* case also indicates, the Federal Trade Commission does not have unbridled power to institute proceedings which will arbitrarily destroy one of many law violators in an industry. This is not such a case. The Commission's refusal

to withhold enforcement of the cease-and-desist order against respondent was based upon a reasonable evaluation of the merits of the petition for a stay; thus it was not within the scope of the reviewing authority of the court below to overthrow the Commission's determination. Consequently, we reverse the judgment below, set aside the stay, and remand the cause for further proceedings consistent with this opinion.[5]

It is so ordered.

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[5] We are informed by the parties that after the Commission's refusal to grant the stay, the respondent presented some evidence to the Commission staff which was relevant to the anticompetitive effects of the discounts offered by two of its competitors. Apparently relying on this evidence, the court below ruled that the Commission was obliged to conduct its own industry investigation and that the pendency of a Department of Justice antitrust investigation of the industry did not relieve the Commission of this responsibility. Since the post-proceeding evidence was not properly before the court below on a petition for review and is not in the record here, we do not reach, and the court below should not have reached, the questions of whether an industry investigation was necessitated by the additional evidence or whether such an investigation would be unnecessary in light of the Department of Justice investigation.